

2001

Allowing a Title VII Punitive Damage Award Without an Accompanying Compensatory or Nominal Award: Further Unifying the Federal Civil Rights Laws

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ARTICLES

Allowing a Title VII Punitive Damage Award Without an Accompanying Compensatory or Nominal Award: Further Unifying the Federal Civil Rights Laws

BY KELLY KOENIG LEVI*

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I. INTRODUCTION

Nearly ten years after Congress passed the Civil Rights Act of 1991,¹ litigants, jurors and the public are quite familiar with the term "punitive damages." Plaintiffs want them, defendants

¹ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C. (1994)). 42 U.S.C. § 1981a(a)(1) enables complaining parties to recover compensatory and punitive damages for Title VII unlawful intentional discrimination, provided that they cannot recover compensatory and punitive damages under 42 U.S.C. § 1981.

fear them, juries award them,² and the public is often fascinated by them. Despite numerous court decisions that demonstrate the availability of punitive damages under Title VII of the Civil Rights Act of 1964³ ("Title VII" or "the Act") and 42 U.S.C. § 1981a,⁴ the courts disagree as to the circumstances in which a plaintiff is entitled to punitive damages. One issue that currently divides courts is whether a jury can award punitive damages to a Title VII plaintiff after it concludes that the plaintiff is not entitled to any compensatory damages under § 1981a. The United States Court of Appeals for the First Circuit has answered this question in the negative, while the Court of Appeals for the Seventh Circuit and several federal district courts have held that a jury *is* permitted to award a Title VII plaintiff punitive damages under § 1981a without awarding compensatory damages under § 1981a.⁵

Suppose that an employee sues her former employer for sex discrimination under Title VII. Also suppose that immediately after the plaintiff perceives the discrimination she leaves her job and immediately accepts a new job that offers her a salary equal to her prior salary. The

² In July 2000, for example, a Florida jury "ordered the tobacco industry . . . to pay \$144.8 billion in punitive damages to some 500,000 Florida smokers." Rick Brag, *Tobacco Lawsuit in Florida Yields Record Damages*, N.Y. TIMES, July 15, 2000, at A1. This ruling, "the largest damage award in United States history," surpassed the \$5 billion punitive damage award against Exxon Mobil for the Exxon Valdez oil spill and the \$4.8 billion award against General Motors as a result of a car fire in California. *Id.* For examples of juries awarding punitive damages in the employment context, see *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 984-85 (4th Cir. 1997) (upholding a jury's punitive damage award of \$150,000 to each of the two plaintiffs); *Luciano v. Olsten Corp.*, 912 F. Supp. 663 (E.D.N.Y. 1996), *aff'd*, 110 F.3d 210 (2d Cir. 1997) (reducing a jury's punitive damage award of \$5,000,002 to \$300,000 pursuant to the statutory limit of 42 U.S.C. § 1981a(b)(3)(D)). See generally ERIK MOLLER ET AL., RAND INST. FOR CIVIL JUSTICE, PUNITIVE DAMAGES IN FINANCIAL INJURY VERDICTS: AN EXECUTIVE SUMMARY (1997) (finding that in cases awarding punitive damages in the analyzed jurisdictions the average award was approximately \$5,300,000 and that for employment cases the average was approximately \$2,700,000), <http://www.rand.org/publications/MR/MR889/MR889.text.html#dispute>.

³ 42 U.S.C. §§ 2000e - 2000e-17 (1994).

⁴ Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a (1994). Section 1981a greatly altered the landscape of employment discrimination law by permitting additional remedies such as compensatory and punitive damages to deter discrimination and to protect victims of intentional discrimination. See *infra* Part III.

⁵ See *infra* Part III.B.

plaintiff, nonetheless, brings a claim under Title VII to punish the defendant company and prevent it from discriminating in the future. The jury finds the defendant liable for sex discrimination, but also finds that the plaintiff did not suffer any economic loss or compensable injury as a result of the discrimination. Also assume that the plaintiff did not request an instruction on nominal damages and, therefore, the jury neither considers nor awards nominal damages. After finding liability, however, the jury further determines that the defendant acted with malice or reckless indifference to the plaintiff's rights, thereby subjecting the defendant to punitive damages under § 1981a.⁶ Should the jury be able to award punitive damages even though it did not award compensatory or nominal damages?

What if, however, the plaintiff is awarded back pay, but is not awarded any compensatory damages pursuant to § 1981a(a)(1), the statutory authority that allows the jury to award compensatory and punitive damages for Title VII claims. Should a back pay award permit the jury to award a plaintiff punitive damages under § 1981a? What if the plaintiff brings discrimination claims pursuant to state and federal law and the jury decides to apportion all compensatory damages according to the plaintiff's state law claims and awards nothing under federal law. Should the jury then be prevented from awarding any punitive damages under federal law?

This Article seeks to answer these questions and advocates a rule that will act to further unify the federal civil rights laws, ensure more consistent and coherent punitive damage jurisprudence under Title VII, and protect both Title VII plaintiffs and defendants. Part II provides a background of the history and purpose of punitive damages.⁷ Part III focuses on early federal civil rights legislation, upon which courts frequently rely for Title VII jurisprudence.⁸ More specifically, Part III provides background to claims under § 1981 and § 1983 and discusses the circumstances under which punitive damages may be awarded pursuant to those statutes. Part IV expands this discussion to include Title VII of the Civil Rights Act of 1964 and the 1991 amendments to Title VII, which include § 1981a.⁹ Thereafter,

⁶ 42 U.S.C. § 1981a(b)(1) (1994). In 1999, the Supreme Court clarified that an employer's conduct does not have to be egregious to satisfy the requirement for punitive damages under § 1981a. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 534-35 (1999). Rather, punitive damages may be awarded when a jury finds that an employer acted "in the face of a perceived risk that its actions" would violate Title VII. *Id.* at 536. This standard also applies to punitive damage claims under 42 U.S.C. § 1981 and 42 U.S.C. § 1983. *See infra* notes 54-60 and accompanying text.

⁷ *See infra* notes 14-45 and accompanying text.

⁸ *See infra* notes 46-97 and accompanying text.

⁹ *See infra* notes 98-124 and accompanying text.

Part IV analyzes the cases that have addressed whether a jury can award punitive damages under § 1981a without first awarding compensatory damages under that statute.¹⁰

Part V argues that neither a nominal award nor a compensatory award of any type should be required to accompany a punitive damage award under § 1981a.¹¹ Specifically, the plain language of § 1981a and Congress's intent to further unify the federal civil rights statutes support this conclusion. Moreover, a victim of an employer's malicious behavior should be entitled to all available damages even when a jury chooses not to award compensatory damages. Allowing the jury's allocation and apportionment of damages to determine whether such victim is entitled to receive punitive damages will cause inconsistent and impractical results—contrary to Congress's intent when it enacted § 1981a. In fact, juries may not understand the task of allocating and apportioning damages, thereby further demonstrating that it is unwise to rely on such allocations as the basis for awarding damages under § 1981a.¹² Part VI argues that protections currently exist to ensure that Title VII defendants will not face increased maximum liability under a framework that allows punitive damages without nominal or compensatory damages.¹³ This section demonstrates that Title VII defendants enjoy greater protections than defendants under other federal civil rights statutes, who already face the possibility of punitive awards even absent accompanying compensatory awards. As a result, a rule that allows punitive damages without accompanying compensatory damages does not place an unreasonable burden on Title VII defendants.

II. PUNITIVE DAMAGES

A. *Historical Perspective of Punitive Damages*

“To . . . understand the . . . [purpose] and application of . . . punitive damages . . . [in] today's jurisprudence, consideration should be given to the [common law] origin of the doctrine.”¹⁴ In many respects, this origin dates back to early English times, when King George II was displeased

¹⁰ See *infra* notes 126-216 and accompanying text.

¹¹ See *infra* notes 220-74 and accompanying text.

¹² See *infra* notes 254-74 and accompanying text.

¹³ See *infra* notes 275-331 and accompanying text.

¹⁴ 1 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 1:01, at 1-2 (2d ed. 2000).

with some material published in North Briton, No. 45.¹⁵ As a result, the Secretary of State to the king issued a warrant to punish and seize members of the paper's staff.¹⁶ The warrant, which was general, did not name a specific person.¹⁷ As a result, John Wilkes, who was believed to be the paper's publisher, had his home searched pursuant to the warrant.¹⁸ In his subsequent claim for trespass reported in *Wilkes v. Wood*,¹⁹ Wilkes requested "large and exemplary damages,"²⁰ and argued that "trifling damage[s] . . . would not put a stop to the type of conduct of which he complained."²¹

The theory of punitive damages emerged simultaneously in *Huckle v. Money*,²² which can be considered a companion case to *Wilkes v. Wood*. "Huckle was an employee of the person thought to be the printer of the North Briton and was taken into custody and detained under the same general warrant referred to in *Wilkes*."²³ All throughout his six hour confinement,²⁴ however, the captor treated Huckle with "kindness and courtesy."²⁵ Huckle brought an action for trespass and imprisonment and the jury concluded that his damages amounted to three hundred pounds, almost three hundred times Huckle's weekly earnings.²⁶ On appeal the captor admitted liability, but alleged that the damages were "most outrageous"²⁷ in light of Huckle's lack of injury, brief confinement and weekly income.²⁸ In response, Lord Chief Justice Camden stated:

I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.²⁹

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Wilkes v. Wood*, 95 Eng. Rep. 766 (K.B. 1763).

²⁰ 1 KIRCHER & WISEMAN, *supra* note 14, § 1:01, at 1-2.

²¹ *Id.*

²² *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763).

²³ 1 KIRCHER & WISEMAN, *supra* note 14, § 1:01, at 1-2.

²⁴ *Id.* § 1:01, at 1-3 n.6.

²⁵ *Id.* § 1:01, at 1-2.

²⁶ *Id.*

²⁷ *Id.* § 1:01, at 1-3.

²⁸ *Id.*

²⁹ *Huckle v. Money*, 95 Eng. Rep. 768, 768-69 (K.B. 1763).

B. Purpose of Punitive Damages: Supporters and Critics

While the early English cases illustrate that punitive damages were sanctioned under the law, disagreement ensued regarding the basis for them and the purpose they were intended to serve.³⁰ Most scholars, however, emphasized that one purpose was to punish and deter the defendant. Eventually, English law evolved to the point at which it was agreed that punitive or exemplary damages were intended to punish and deter the defendant,³¹ while compensatory damages were to compensate the plaintiff for injury and economic loss.³² Early American cases demonstrated the English confusion over the issue of whether punitive damages were meant to deter and punish or to compensate.³³ In *Coryell v. Colbaugh*,³⁴ “the first American case to enunciate the doctrine,”³⁵ punitive damages were awarded for “*example’s sake*”³⁶ and for compensation as a result of the defendant’s breach of promise to marry the plaintiff.³⁷

In the 1850s, however, the deterrent function of punitive damages became well established in American jurisprudence.³⁸ In *Day v. Woodworth*,³⁹ the Supreme Court stated that

³⁰ 1 KIRCHER & WISEMAN, *supra* note 14, § 1:02, at 1-4. Several theories were advanced for allowing punitive damages. *Id.* One theory proposed that punitive damages were allowed because of courts’ reluctance to grant new trials based on excessive damages in cases that evidenced malice, oppression, gross fraud, or negligence. *See* *Earl v. Tupper*, 45 Vt. 275, 286 (1873), *available at* 1873 WL 994; 1 KIRCHER & WISEMAN, *supra* note 14, § 1:02, at 1-4. Another theory suggested that the doctrine developed as a result of courts’ reluctance to recognize that attaching an exact pecuniary value to certain injuries was difficult. *See* *Stuart v. W. Union Tel. Co.*, 18 S.W. 351 (Tex. 1885); 1 KIRCHER & WISEMAN, *supra* note 14, § 1:02, at 1-5. Under a third theory, the availability of punitive damages was “to compensate the plaintiff for those damages which, at the time, were not legally compensable.” *Id.* For other theories arguing that punitive damages were not meant to punish or deter, see 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES § 1.3(F)-(G) (4th ed. 2000).

³¹ 1 KIRCHER & WISEMAN, *supra* note 14, § 1:03, at 1-8.

³² *See* CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 77, at 278 (1935). The purpose of compensatory damages, to compensate for injury and economic loss, is well established under American law. *See* RESTATEMENT (SECOND) OF TORTS § 903 (1964).

³³ 1 SCHLUETER & REDDEN, *supra* note 30, § 1.4(A), at 14.

³⁴ *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791).

³⁵ 1 SCHLUETER & REDDEN, *supra* note 30, § 1.4(A), at 15.

³⁶ *Coryell*, 1 N.J.L. at 77.

³⁷ *Id.*

³⁸ 1 SCHLUETER & REDDEN, *supra* note 30, § 1.4(A), at 15-16.

³⁹ *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851).

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff.⁴⁰

Nonetheless, awarding punitive damages as a civil remedy to punish and deter has not operated without criticism in the United States.⁴¹ Those who support the concept of punitive damages claim that punishment serves an important function in the civil law and more specifically, that "[e]xperience indicates that there is definite need for the type of award having more the quality of punishment than of compensation."⁴² Critics argue that the purpose of civil law is to compensate and that if the action does not amount to a crime, one should not suffer punishment.⁴³ Despite such controversy, American courts have accepted the notion of employing punitive damages for the purpose of punishment and deterrence.⁴⁴ The availability of compensatory damages for pain, suffering, and economic loss has made the award of punitive damages on such bases redundant. As a result, there is considerable uniformity in the general aspects of the application of punitive damages among the jurisdictions within the United States. While each state is free to apply the doctrine independently when considering state law claims, each jurisdiction must follow federal common law when applying the doctrine of punitive damages under the federal civil rights statutes.⁴⁵

⁴⁰ *Id.* at 371.

⁴¹ 1 KIRCHER & WISEMAN, *supra* note 14, § 2:01, at 2-2. In 1873, Justice Foster of the New Hampshire Supreme Court stated that "[t]he idea [of punitive damages] is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy ecresence, deforming the symmetry of the body of the law." *Fay v. Parker*, 53 N.H. 342, 382 (1873).

⁴² Philip H. Corboy, *Should Punitive Damages Be Abolished?—A Statement for the Negative*, 1965 A.B.A. SEC. INS., NEGL. & COMPENSATION L. PROC., 292, 293.

⁴³ See 1 KIRCHER & WISEMAN, *supra* note 14, § 2:02, at 2-5.

⁴⁴ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (stating that punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 2, at 9 (5th ed. 1984) (stating that punitive damages are awarded to punish defendants, teaching them not to "do it again," and to deter others from similar behavior).

⁴⁵ In *Basista v. Weir*, the Court of Appeals for the Third Circuit held that state law, under which punitive damages could not be awarded in the absence of actual damages, was inapplicable in a case in which the plaintiff alleged deprivation of civil rights under 42 U.S.C. § 1983. *Basista v. Weir*, 340 F.2d 74, 85-87 (3d Cir.

III. PUNITIVE DAMAGES UNDER THE EARLY FEDERAL CIVIL RIGHTS LAWS

Sections 1981 and 1983 are parts of the Civil Rights Acts that were enacted after the Civil War to “give force and effect to the newly ratified Thirteenth, Fourteenth, and Fifteenth Amendments.”⁴⁶ Section 1981 provides “a federal remedy against discrimination in private employment on the basis of race,”⁴⁷ while § 1983 affords a remedy for discrimination where there is “state action.”⁴⁸ Because much of Title VII punitive damage jurisprudence refers to and relies upon § 1981 and § 1983 decisions,⁴⁹ it is appropriate to discuss the punitive damage doctrine under these early federal civil rights laws.

A. Section 1981

Section 1981(a) provides, in material part, that “[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.”⁵⁰ In *Johnson v. Railway Express Agency*⁵¹ the Court concluded that § 1981 provides a basis for an independent federal cause of action for racial discrimination in employment.⁵²

1965). In doing so, the court reasoned that the Civil Rights Acts were intended to have uniform effect throughout the country and that federal common law, rather than state law, must apply to achieve such uniformity. *Id.* at 86. The court also noted that the application of federal law on the issue of compensatory damages and the application of state law on the issue of punitive damages would “create a legal hybrid of an incredible and unworkable kind.” *Id.* at 87.

⁴⁶ See BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 668 (2d ed. 1983).

⁴⁷ *Johnson v. Ry. Express Agency*, 421 U.S. 454, 459-60 (1975).

⁴⁸ SCHLEI & GROSSMAN, *supra* note 46, at 678.

⁴⁹ EQUAL EMPLOYMENT OPPORTUNITY COMM’N, COMPENSATORY AND PUNITIVE DAMAGES UNDER SECTION 102 OF THE CIVIL RIGHTS ACT OF 1991, POLICY STATEMENT NO. 915.002, EEOC Compl. Man. (CCH) ¶ 2062, at 2071 n.13 (July 14, 1992). The Commission’s position statement stated that “[c]ases awarding compensatory and punitive damages under other civil rights statutes will be used for guidance in analyzing the availability of damages under § 1981a. Section 1981 cases are particularly useful because Congress treated the § 1981a damage provisions as an amendment to § 1981.” *Id.*

⁵⁰ 42 U.S.C. § 1981(a) (1994).

⁵¹ *Johnson v. Ry. Express Agency*, 421 U.S. 454 (1975).

⁵² *Id.* at 459-60. In *Patterson v. McLean Credit Union*, the Court held that § 1981 covers employment discrimination in the aspects of contract formation and

In doing so, the Supreme Court further confirmed that a § 1981 plaintiff is entitled to recover compensatory and, when appropriate, punitive damages.⁵³

In *Smith v. Wade*,⁵⁴ the Supreme Court expanded the applicability of punitive damages under § 1981. More specifically, the Court addressed the standard required for punitive damages under 42 U.S.C. § 1983.⁵⁵ Although the decision interprets § 1983, courts generally refer to the *Smith* standard as also applicable to § 1981. In *Smith*, the defendant argued that the appropriate standard for punitive damages was "actual malicious intent—'ill will, spite, or intent to injure.'"⁵⁶ The Court noted that the majority of jurisdictions had concluded that a showing of "recklessness, serious indifference to or disregard for the rights of others, or even gross negligence"⁵⁷ would suffice, thereby stopping short of requiring a showing of actual ill will, spite or intent to injure.⁵⁸ As a result, the Court determined that it would follow the common law standard, so that "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law,"⁵⁹ are sufficient to allow a jury to consider whether a punitive damage award is warranted.⁶⁰

contract enforcement, but declined to read the section to include racial harassment based on the "make and enforce contracts" language of § 1981(a). *Patterson v. McLean Credit Union*, 491 U.S. 164, 178-80 (1989). The Civil Rights Act of 1991 amended § 1981 by stating, "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1072 (1991) (codified as amended at 42 U.S.C. § 1981(b)). In doing so, Congress overruled *Patterson* and expanded the causes of action available to a § 1981 plaintiff to be parallel to the causes of action available to a Title VII plaintiff. See 42 U.S.C. § 2000e-2(a)(1) (1994).

⁵³ *Johnson*, 421 U.S. at 460; see, e.g., *Lee v. S. Home Sites Corp.* 429 F.2d 290, 294 (5th Cir. 1970); *Basista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965); *Gaston v. Gibson*, 328 F. Supp. 3, 5-6 (E.D. Tenn. 1969); *Tracy v. Robbins*, 40 F.R.D. 108, 113 (W.D.S.C. 1966); *Brooks v. Moss*, 242 F. Supp. 531, 532 (W.D.S.C. 1965). For examples of differences with respect to damages under § 1981 and damages under Title VII, see *infra* Part IV.

⁵⁴ *Smith v. Wade*, 461 U.S. 30 (1983).

⁵⁵ *Id.* at 31.

⁵⁶ *Id.* at 37.

⁵⁷ *Id.* at 46.

⁵⁸ *Id.* at 47-48.

⁵⁹ *Id.* at 51.

⁶⁰ *Id.*

Despite numerous cases subsequent to *Johnson* and *Smith* focusing on the standard required for punitive damages under § 1981, few cases have addressed whether punitive damages can be awarded absent a finding of compensatory damages under § 1981. In *Carey v. Piphus*,⁶¹ the U.S. Supreme Court held that the violation of certain absolute rights may entitle a plaintiff to an award of nominal damages even absent proof of actual injury.⁶² In *Carey*, the plaintiffs brought a claim under § 1983, charging that they had been suspended from school without procedural due process of law.⁶³ In considering the elements and prerequisites for recovery of damages for the students who were suspended without procedural due process, the Court concluded that in the absence of proof of actual injury, the students were not entitled to recover compensatory damages, but were entitled to nominal damages only.⁶⁴ The Court further elaborated that through awarding nominal sums of money, “[c]ommon-law courts . . . vindicate[] [the] deprivation[] of certain ‘absolute’ rights that are not shown to have caused actual injury.”⁶⁵ In doing so, the Court emphasized that those rights must be scrupulously observed.⁶⁶

Although *Carey* focused on a violation of procedural due process, courts have relied on the decision to conclude that the right to be free from discrimination under § 1981 is absolute, and proof of its violation allows the plaintiff to obtain nominal damages. In *Edwards v. Jewish Hospital of St. Louis*,⁶⁷ for example, the plaintiff filed suit under § 1981 alleging that the defendant discharged him on the basis of race.⁶⁸ After upholding the finding of a § 1981 violation,⁶⁹ the Eighth Circuit stated that “it cannot be seriously disputed that the right to be free from intentional racial employment discrimination is absolute in the same sense [as the right to procedural due process]”⁷⁰ and therefore the plaintiff was entitled to

⁶¹ *Carey v. Piphus*, 435 U.S. 247 (1978).

⁶² *Id.* at 266.

⁶³ *Id.* at 248.

⁶⁴ *Id.* at 266.

⁶⁵ *Id.*

⁶⁶ *Id.* Despite discussing the award of nominal damages to vindicate a deprivation of certain rights, the Court stated that compensatory “damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.” *Id.*

⁶⁷ *Edwards v. Jewish Hosp. of St. Louis*, 855 F.2d 1345 (8th Cir. 1988).

⁶⁸ *Id.* at 1348.

⁶⁹ *Id.* at 1348-53.

⁷⁰ *Id.* at 1350.

nominal damages even without demonstrating actual injury.⁷¹ As a result, the court upheld the trial court's conclusions that the plaintiff was not entitled to any compensatory damages but was entitled to \$25,000 in punitive damages based on the \$1 nominal award.⁷² In doing so, the Eighth Circuit endorsed the principle that a jury could award punitive damages under § 1981 although the plaintiff suffered no compensable injury.⁷³

Several courts have relied on *Johnson* and *Smith* to conclude that a § 1981 plaintiff may recover punitive damages absent a compensatory award. In *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*,⁷⁴ for example, an employee brought suit against his former employer alleging racial discrimination in violation of § 1981.⁷⁵ The jury awarded the plaintiff \$1 in nominal damages and \$150,000 in punitive damages against each of two defendants.⁷⁶ In evaluating the defendants' motion for a judgment notwithstanding the verdict based on the argument that the evidence did not support an award of punitive damages, the court emphasized that the defendants were correct in conceding that a plaintiff who proves a cause of action under § 1981 may recover punitive damages even when the plaintiff is entitled to nominal damages only.⁷⁷ Likewise, in *Kim v. Dial Service International, Inc.*,⁷⁸ a New York court evaluating the relationship between

⁷¹ *Id.* at 1348-53. Even before courts applied *Carey* to conclude that proof of some civil rights violations allow a plaintiff to obtain nominal damages, at least one court concluded that "[a]s a matter of federal common law it is not necessary to allege nominal damages and nominal damages are proved by proof of deprivation [sic] of a right to which the plaintiff was entitled." *Basista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965).

⁷² *Edwards*, 855 F.2d at 1348-53.

⁷³ Soon after *Edwards*, in *Hicks v. Brown Group, Inc.*, the Eighth Circuit again relied on *Carey* to reiterate that § 1981 "grants an absolute right to be free of discrimination in the making and enforcement of contracts, the violation of which entitles the victim to nominal damages irrespective of actual injury." *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 652 (8th Cir. 1990), *vacated on other grounds* by 499 U.S. 914 (1991).

⁷⁴ *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104 (6th Cir. 1987).

⁷⁵ *Id.* at 1106.

⁷⁶ *Id.* at 1107.

⁷⁷ *Id.* at 1108; *see also City & Suburban Distributors-Illinois, Inc., v. Stroh Brewery Co.*, No. 87-C1409, 1997 WL 311934, at *4 (N.D. Ill. June 5, 1997) (holding that because § 1981 allows for punitive damages based on nominal awards, the inability to obtain compensatory damages is not an impediment).

⁷⁸ *Kim v. Dial Serv. Int'l, Inc.*, No. 96 CIV 3327, 1997 WL 458783 (S.D.N.Y. Aug. 11, 1997), *aff'd*, 159 F.3d 1347 (2d Cir. 1998).

a compensatory award and punitive damage award under a § 1981 claim noted that “punitive damages may be awarded under § 1981 when the only non-exemplary damages are nominal damages.”⁷⁹ In sum, these cases demonstrate that a victim of § 1981 discrimination is entitled to an award of nominal damages, despite suffering no compensable injury, and that such nominal award is a sufficient basis for a jury to award punitive damages without awarding compensatory damages.⁸⁰

B. Section 1983

Enacted in 1871 and entitled “Civil Action for Deprivation of Rights,” 42 U.S.C. § 1983 provides in material part:

[E]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.⁸¹

To state a claim under § 1983, the conduct complained of must have been committed by an individual or entity acting under the color of state law and must have deprived the plaintiff of a right or privilege secured by the Constitution or laws of the United States.⁸² Section 1983 was intended to create “a species of tort liability”⁸³ in favor of persons deprived of

⁷⁹ *Id.* at *15.

⁸⁰ While the standard of proof for imposition of punitive damages must be met in all circumstances when punitive damages are considered, when there is a low award of compensatory damages or where the monetary value of noneconomic harm may be difficult to determine, a high award of punitive damages may be justified, but it must still be reasonable. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582-83 (1996); *Edwards v. Jewish Hosp. of St. Louis*, 855 F.2d 1345, 1352 (8th Cir. 1998) (concluding that “[t]o apply the proportionality rule to a nominal damages award would invalidate most punitive damages awards because only very low punitive damage awards could be said to bear a reasonable relationship to the amount of a nominal damages award”). *But cf.*, *Beckford v. Irvin*, 49 F. Supp. 2d 170, 186 (W.D.N.Y. 1999) (stating that “[b]ecause no compensable damages were found by the jury, only a small punitive damages award is appropriate”).

⁸¹ 42 U.S.C. § 1983 (1994).

⁸² *West v. Atkins*, 487 U.S. 42, 48 (1988); *Maine v. Thiboutot*, 448 U.S. 1, 7-8 (1980).

⁸³ *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

federally-secured rights.⁸⁴ Unlike § 1981, which allows a private suit based on intentional race discrimination and does not involve a public official, a § 1983 action involves a public employee who, while acting within his official capacity, allegedly violated the plaintiff's constitutional rights.⁸⁵

Although Congress did not directly address the issue of damages when it enacted § 1983, subsequent court decisions have held that both compensatory and punitive damages are available to a § 1983 plaintiff. In *Carey v. Piphus*,⁸⁶ prior to concluding that the violation of certain absolute rights may entitle a plaintiff to an award of nominal damages even absent proof of actual damages,⁸⁷ the U.S. Supreme Court confirmed that compensatory damages are available to a § 1983 plaintiff.⁸⁸ Thereafter, in *Smith v. Wade*,⁸⁹ the U.S. Supreme Court reasoned that punitive damages are available in § 1983 actions to advance the statute's purpose of securing the protection of constitutional rights.⁹⁰ The Court pointed to an earlier decision in which it concluded that "[b]y allowing juries and courts to assess punitive damages in appropriate circumstances . . . § 1983 directly advances the public's interest in preventing repeated constitutional deprivations . . . [and ensures] protection against the prospect that a public official may engage in recurrent constitutional violations."⁹¹ After doing so, the Court noted that such policies and purposes of § 1983 suggest no reason to allow less relief for violations of constitutional rights than for ordinary torts.⁹² Thereafter, the Court concluded "that a jury may be permitted to assess punitive damages under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."⁹³

⁸⁴ *Smith v. Wade*, 461 U.S. 30, 34 (1983); *Carey v. Piphus*, 435 U.S. 247, 253 (1978); *Imbler*, 424 U.S. at 417.

⁸⁵ *West*, 487 U.S. at 50.

⁸⁶ *Carey*, 435 U.S. at 247.

⁸⁷ *Id.* at 266.

⁸⁸ *Id.* at 256-57. In *Carey*, the Court also noted in dicta that "[t]his is not to say that exemplary or punitive damages might not be awarded in a proper case under § 1983 with the specific purpose of deterring or punishing violations of constitutional rights." *Id.* at 257 n.11.

⁸⁹ *Smith*, 461 U.S. at 30.

⁹⁰ *Id.* at 35.

⁹¹ *Id.* at 36 n.5 (citing *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981)).

⁹² *Id.* at 48-49.

⁹³ *Id.* at 56.

Unlike the § 1981 context, where relatively few cases have discussed awarding punitive damages without an accompanying compensatory award, it is well established that when a jury finds a constitutional violation under § 1983, it may award punitive damages even without awarding compensatory damages.⁹⁴ To do so, courts often rely on *Carey v. Phipus*⁹⁵ and emphasize that when a jury concludes that the plaintiff has proven a constitutional violation, but has not shown injury sufficient to warrant a compensatory damage award, the plaintiff is entitled to an award of at least nominal damages as a matter of law.⁹⁶ Thereafter, courts regularly conclude that a finding of liability and subsequent nominal award will suffice as the basis for a jury's punitive award under § 1983.⁹⁷

IV. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Background of Title VII

Title VII of the Civil Rights Act of 1964⁹⁸ represents a landmark in employment discrimination legislation. Title VII protects employees

⁹⁴ See, e.g., *King v. Macri*, 993 F.2d 294, 298 (2d Cir. 1993); *Davis v. Locke*, 936 F.2d 1208, 1214 (11th Cir. 1991); *Erwin v. County of Manitowoc*, 872 F.2d 1292, 1299 (7th Cir. 1989); *Green v. McKaskle*, 788 F.2d 1116, 1124 (5th Cir. 1986); *Baltezore v. Concordia Parish Sheriff's Dep't*, 767 F.2d 202, 208 n.6 (5th Cir. 1985); *Goodwin v. Circuit Court of St. Louis County, Mo.*, 729 F.2d 541, 548 (8th Cir. 1984); *Ryland v. Shapiro*, 708 F.2d 967, 976 (5th Cir. 1983); *Lamar v. Steele*, 693 F.2d 559, 563 (5th Cir. 1982); *Wilson v. Taylor*, 658 F.2d 1021, 1033 (5th Cir. Unit B Oct. 1981); *McCulloch v. Glasgow*, 620 F.2d 47, 51 (5th Cir. 1980).

⁹⁵ *Carey v. Phipus*, 435 U.S. 247 (1978).

⁹⁶ See *Robinson v. Cattaraugus County*, 147 F.3d 153, 162 (2d Cir. 1998); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 431 (2d Cir. 1995); *Gibeau v. Nellis*, 18 F.3d 107, 110-11 (2d Cir. 1994); *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984); *Beckford v. Irvin*, 49 F. Supp. 2d 170, 182 (W.D.N.Y. 1999); *Perez v. Cucci*, 725 F. Supp. 209, 257 n.36 (D.N.J. 1989), *aff'd*, 898 F.2d 142 (3d Cir. 1990).

⁹⁷ See *Zarcone v. Perry*, 572 F.2d 52, 55-56 (2d Cir. 1978); *Basista v. Weir*, 340 F.2d 74, 86-88 (3d Cir. 1965); *Mansell v. Saunders*, 372 F.2d 573, 576 (1st Cir. 1967); *Brooks v. Shipman*, 503 F. Supp. 40, 44-45 (W.D. Pa. 1980), *aff'd*, 681 F.2d 804 (3d Cir. 1982); *Lamb v. Cartwright*, 393 F. Supp. 1081, 1085 (E.D. Tex. 1975), *aff'd*, 524 F.2d 238 (5th Cir. 1975); *supra* note 94.

⁹⁸ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17(1994)).

against discrimination based on race, color, sex, national origin and religion in the employment relationship.⁹⁹ From the start, the Act gave courts the authority to award back pay and any other equitable remedies deemed appropriate to eradicate discrimination in the workplace.¹⁰⁰ Although the Act did not state that compensatory and punitive damages were prohibited under Title VII, courts regularly construed the damages provision as prohibiting such relief.¹⁰¹ In 1991, however, Congress amended the Civil Rights Act of 1964 to add compensatory and punitive damages as Title VII remedies for unlawful intentional discrimination.¹⁰² The 1991 Act greatly altered the landscape of employment discrimination law by permitting additional remedies to deter discrimination and by offering greater protection to victims of intentional discrimination.¹⁰³

The most significant factor prompting the need for the 1991 revisions was the disparity among the remedies and protections available under the

⁹⁹ Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (1994).

¹⁰⁰ Civil Rights Act of 1964 § 706, 42 U.S.C. § 2000e-5 (1994). Section 2000e-5(g)(1) currently states:

If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice . . . , the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.

Id.

¹⁰¹ While an argument exists for construing the section as permitting compensatory and punitive damages, such as in *Claiborne v. Illinois Central Railroad*, 401 F. Supp. 1022, 1026-27 (E.D. La. 1975), *aff'd in part, vacated in part*, 583 F.2d 143 (5th Cir. 1978), courts unanimously rejected compensatory and punitive damages as available remedies under Title VII.

¹⁰² See Civil Rights Act of 1991, § 102(a)(1), 42 U.S.C. § 1981a(a)(1). Section 1981a(a)(1) states that:

In an action brought by a complaining party under 706 or 717 of the Civil Rights Act of 1964 . . . against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) . . . and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706 (g) of the Civil Rights Act of 1964 . . . from the respondent.

Id.

¹⁰³ *Id.*

various federal civil rights statutes.¹⁰⁴ Congress realized that discrimination victims who suffered identical treatment received greater protection and relief under § 1981 and § 1983 than under Title VII,¹⁰⁵ thereby suggesting that the Title VII remedy was inadequate and impeded unity among the federal civil rights statutes. More specifically, because § 1981 protected against racial discrimination only and allowed for compensatory and punitive damages, victims of other forms of discrimination—who were not entitled to compensatory or punitive damages under Title VII—recovered smaller awards than victims of race discrimination.¹⁰⁶ As a result, section 102 of the 1991 Act, codified at 42 U.S.C. § 1981a, allows a complaining party to collect compensatory damages, which “make discrimination victims whole for the terrible injury to their careers, . . . health, and . . . self-respect” caused by their employer’s discriminatory conduct.¹⁰⁷ Likewise, it allows for punitive damage awards,¹⁰⁸ which are intended to punish employers for their unlawful conduct, reinforce public policy against discrimination, and add to the deterrent value of damage awards.¹⁰⁹

¹⁰⁴ See Michael W. Roskiewicz, Note, *Title VII Remedies: Lifting the Statutory Caps From the Civil Rights Act of 1991 to Achieve Equal Remedies for Employment Discrimination*, 43 WASH. U. J. URB. & CONTEMP. L. 391, 397 (1993). Other factors that motivated Congress towards the 1991 amendments included the heightened awareness of hostility towards minorities and women in the workplace, the widespread effects of sexual harassment in American society, and the expansion of state employment discrimination laws. *Id.* at 397-400.

¹⁰⁵ *Id.* at 397.

¹⁰⁶ *Id.* & n.30.

¹⁰⁷ H.R. REP. NO. 102-40(I), at 65 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 603. The Equal Employment Opportunity Commission, the primary enforcement mechanism against Title VII discrimination, stated the following with respect to compensatory damages under the 1991 Act:

Damages are available for the intangible injuries of emotional harm such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. Other nonpecuniary losses could include injury to professional standing, injury to character and reputation, injury to credit standing, loss of health, and any other nonpecuniary losses that are incurred as a result of the discriminatory conduct.

EQUAL EMPLOYMENT OPPORTUNITY COMM’N, *supra* note 49, ¶ 2062, at 2071.

¹⁰⁸ 42 U.S.C. § 1981a(a)(1) (1994).

¹⁰⁹ See 137 CONG. REC. H9526 (daily ed. Nov. 7, 1991) (statement of Rep. Edwards). In determining punitive damage awards, “[t]he jury is to be guided by the same principles that have traditionally guided . . . [punitive damage awards, including] the amount necessary to punish the defendant for its conduct and to deter the defendant and other employers from engaging in . . . [similar future

Indeed, § 1981a again confirmed that, unlike in former times, it is now well-settled that punitive damages are proper to punish defendants for improper and illegal behavior.

While § 1981a took major steps to unify the remedies among the federal civil rights statutes, the relief available and the process for obtaining such relief remains more favorable under § 1981 and § 1983.¹¹⁰ First, there are no administrative and filing prerequisites to bring a claim under § 1981 or § 1983. Such actions may be brought directly in state or federal court and because there is no federal limitations period, the appropriate state statute of limitations is followed.¹¹¹ In contrast, Title VII actions cannot proceed in federal court unless a charge of discrimination has first been filed with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged unlawful employment practice.¹¹² Second, unlike Title VII, "[§ 1981] provide[s] protection to victims of discrimination regardless of the size of the employer and allow[s] recovery of back pay for an indefinite period of time."¹¹³ In contrast, Title VII

conduct.]" *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. 1997).

¹¹⁰ While a plaintiff may bring a *private* race discrimination claim under § 1981 and Title VII, state action must be present for a plaintiff to assert such a claim under § 1983. *See supra* note 48 and accompanying text. Envisioning that parties would bring simultaneous actions under § 1981 and Title VII, § 1981a enables complaining parties to recover compensatory and punitive damages for unlawful intentional discrimination provided they cannot recover such damages under § 1981. 42 U.S.C. § 1981a(a)(1) (1994); *see Dunning v. Gen. Elec. Co.*, 892 F. Supp. 1424, 1427-31 (M.D. Ala. 1995) (finding that damages are available under § 1981a only where there can be no double recovery); *Earvin v. Warner-Jenkinson Co.*, 67 Fair Empl. Prac. Cas. (BNA) 481, 482 (E.D. Mo. 1995) (considering claims under § 1981 and Title VII and dismissing the Title VII claims, thereby concluding "that the Title VII claim duplicate[d] the relief available under § 1981 and should be dismissed"). In sum, Congress explicitly prevented double recovery under § 1981 and § 1981a, while emphasizing that nothing in § 1981a should "be construed to limit the scope of, or the relief available under, § 1981." 42 U.S.C. § 1981a(b)(4).

¹¹¹ *Johnson v. Ry. Express Agency*, 421 U.S. 454, 463-64 (1975).

¹¹² 42 U.S.C. § 2000e-5(e)(1) (1994); *Del. State Coll. v. Ricks*, 449 U.S. 250, 256 (1980); *Equal Employment Opportunity Comm'n v. Dinuba Med. Clinic*, 222 F.3d 580, 585 (9th Cir. 2000). The time for filing a charge with the EEOC is "extended to 300 days if the charge is initially filed with a state agency that enforces its own anti-discrimination laws." *Id.*; *see* 42 U.S.C. § 2000e-5(e)(1) (1994). A charge initially filed with a state agency will be treated as constructively filed with the EEOC upon either the expiration of sixty days or the termination of the agency proceedings. 42 U.S.C. § 2000e-5(c) (1994).

¹¹³ *Roskiewicz, supra* note 104, at 396-97.

applies only to employers with fifteen or more employees¹¹⁴ and allows a victim to recover back pay for discrimination accruing not more than two years prior to the filing of a charge with the EEOC.¹¹⁵ Most importantly, unlike § 1981 and § 1983, § 1981a caps the amount of compensatory and punitive damages an employee may recover depending on the size of the employer, with no plaintiff recovering in excess of \$300,000.¹¹⁶ Such caps reflect a compromise balancing an employee's interest in protection from discrimination against an employer's interest in guarding against financial ruin and frivolous lawsuits. Despite the caps, which proved to be

¹¹⁴ 42 U.S.C. § 2000e(b) (1994).

¹¹⁵ *Id.* § 2000e-5(g)(1); see Cynthia L. Alexander, *The Defeat of the Civil Rights Act of 1990: Wading Through the Rhetoric in Search of Compromise*, 44 VAND. L. REV. 595, 621-25 (1991); James L. Hughes et al., *Back Pay in Employment Discrimination Cases*, 35 VAND. L. REV. 893 (1982).

¹¹⁶ 42 U.S.C. § 1981a(b)(3) (1994). Section 1981a(b)(3) provides that:

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees . . . , \$50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees . . . , \$100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees . . . , \$200,000; and

(D) in the case of a respondent who has more than 500 employees . . . , \$300,000.

Id. As a result of the caps, Congress seemed to codify the very disparity it attempted to correct. Prior to the Civil Rights Act of 1991, victims of racial discrimination could recover unlimited compensatory and punitive damages under § 1981, while Title VII limited victims of other forms of discrimination to equitable remedies. Under § 1981a, courts maintain discretion to award relief for claims pursuant to § 1981, while victims of non-racial discrimination can recover an amount based on the size of the employer. Interestingly, however, very few punitive damage awards in the § 1981 context have exceeded the Title VII statutory cap provision. See Wendy White et al., *Analysis of Damage Awards Under Section 1981* (Mar. 14, 1990) (unpublished manuscript, on file with author).

Initially, without being influenced by the statutory caps, the jury sets the punitive damage award. *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. 1997). Then, if the total of the compensatory and punitive awards exceeds the relevant cap, the district court will reduce the total award to ensure that it does not surpass the cap for an employer of the defendant's size. *Id.*

controversial,¹¹⁷ it is important to note that economic damages, such as lost wages that have occurred at the time of suit, are not included under the caps of § 1981a.¹¹⁸ Rather, lost wages were provided for prior to § 1981a and are, therefore, fully compensable regardless of the amount or size of the employer.¹¹⁹ Finally, unlike under § 1981 and § 1983,¹²⁰ a Title VII violation does not automatically result in a nominal damage award. Instead, a Title VII plaintiff must request a jury instruction regarding nominal damages.¹²¹

Since the passage of § 1981a, juries have regularly awarded compensatory and punitive damages to victims of unlawful intentional discrimination under Title VII.¹²² Many of these awards, however, have not gone uncontested in post-trial motions. While Title VII defendants often make a motion for a new trial¹²³ or a motion for remitti-

¹¹⁷ See Roskiewicz, *supra* note 104, at 393-94.

¹¹⁸ 42 U.S.C. § 1981a(b)(3) (1994).

¹¹⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (1964) (current version at 42 U.S.C. § 2000e-5(g) (1994)). Because back pay is provided for in § 2000e-5(g), it is excluded from compensatory damages under the 1991 Act "to prevent double recovery." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 253 (1994); see 42 U.S.C. § 1981a(b)(2).

¹²⁰ See *supra* notes 61-73 and accompanying text.

¹²¹ See *Buckner v. Franco, Inc.*, No. 97-6028, 1999 WL 232704, at *4 (6th Cir. Apr. 12, 1999) (concluding that nominal damages are not required for violations of Title VII); *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205, 1215 & n.6 (1st Cir. 1995) ("[n]othing in *Carey* mandates the award of nominal damages' in a Title VII case") (quoting *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 845 (11th Cir. 1991)).

¹²² See, e.g., *Harris v. L & L Wings, Inc.*, 132 F.3d 978 (4th Cir. 1997); *Delph v. Dr. Pepper Bottling Co. of Paragould*, 130 F.3d 349 (8th Cir. 1997); *Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436 (7th Cir. 1997); *Luciano v. Olsten Corp.*, 110 F.3d 210 (2^d Cir. 1997); *Hearn v. Gen. Elec. Co.*, 927 F. Supp. 1486 (M.D. Ala. 1996); *Williams v. Pharmacia Ophthalmics, Inc.*, 926 F. Supp. 791 (N.D. Ind. 1996), *aff'd sub nom. Williams v. Pharmacia, Inc.*, 137 F.3d 944 (7th Cir. 1998); *Probst v. Reno*, 917 F. Supp. 554 (N.D. Ill. 1995); *Reynolds v. Octel Communications Corp.*, 924 F. Supp. 743 (N.D. Tex. 1995); *Emmel v. Coca-Cola Bottling Co. of Chicago*, 904 F. Supp. 723 (N.D. Ill. 1995), *aff'd*, 95 F.3d 627 (7th Cir. 1996); *Sassaman v. Heart City Toyota*, 879 F. Supp. 901 (N.D. Ind. 1994). Victims of unintentional discrimination, known as disparate impact discrimination, are not entitled to compensatory and punitive damages under § 1981a. 42 U.S.C. § 1981a(a)(1) (1994).

¹²³ Federal Rule of Civil Procedure 59(a) provides that:

A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of

tur,¹²⁴ thereby forcing the court to evaluate the amount of the punitive damages award,¹²⁵ some defendants challenge the award itself, thereby forcing the court to determine if punitive damages are justified at all. A common challenge, one which has produced a federal circuit split, is whether a jury can award punitive damages after concluding that the plaintiff did not suffer any compensable injury under § 1981a.

B. Section 1981a Punitive Damage Awards Without a § 1981a Compensatory or Nominal Damage Award?

1. Courts That Do Not Require a Compensatory Award

a. Hennessy v. Penril Datacomm Networks, Inc.

In *Hennessy v. Penril Datacomm Networks, Inc.*,¹²⁶ the Court of Appeals for the Seventh Circuit addressed whether a compensatory award must accompany a punitive damage award under § 1981a. Patricia Hennessy, a former sales employee of Penril,¹²⁷ brought suit against Penril and her individual supervisor alleging claims of sex and pregnancy discrimination in violation of Title VII.¹²⁸ After finding liability, the jury did not award Hennessy any compensatory damages, but awarded punitive damages totaling \$350,000.¹²⁹ Pursuant to post trial motions, the court awarded Hennessy back pay and ordered Penril to reinstate her to her employment position.¹³⁰ On appeal, Penril argued that Hennessy was not

the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

FED. R. CIV. P. 59(a).

¹²⁴ "Remittitur is the process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial." Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45, 49 (2d Cir. 1984).

¹²⁵ In a federal question case, a district court has discretion to conclude that a damage "award [is] excessive if it 'shock[s] the judicial conscience' by resulting in a miscarriage of justice." *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 18 (2d Cir. 1996) (second alteration in original) (quoting *Matthews v. CTI Container Transp. Int'l Inc.*, 871 F.2d 270, 278 (2d Cir. 1980)).

¹²⁶ *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995).

¹²⁷ *Id.* at 1347.

¹²⁸ *Id.* at 1348-49.

¹²⁹ *Id.* at 1349.

¹³⁰ *Id.* Because Title VII does not cover supervisor liability, Hennessy's supervisor was dismissed from the case. *Id.* The court also reduced the punitive

entitled to any punitive damage award because the jury denied her compensatory damages.¹³¹ To support its contention, Penril relied on a series of Illinois common law tort cases holding that "punitive damages may not be assessed in the absence of compensatory damages."¹³² The Seventh Circuit, however, immediately rejected Penril's reliance on Illinois common law and emphasized that the present case was a federal civil rights action under Title VII, which is governed by the damage provisions found in § 1981a.¹³³

The court then focused on § 1981a. First, the court stressed that "[n]othing in the plain language of § 1981a conditions an award of punitive damages on an underlying award of compensatory damages."¹³⁴ Second, the court emphasized that unlike compensatory damages at common law, which include back pay, § 1981a¹³⁵ prohibits the jury to consider back pay as an element of compensatory damages.¹³⁶ Specifically, back pay is not included in § 1981a¹³⁷ because it is provided for in an earlier section of Title VII,¹³⁸ thereby preventing double recovery.¹³⁹ As a result, the court

damage award against Penril to \$100,000, and granted Hennessy's petition for attorney's fees and costs. *Id.*

¹³¹ *Id.* at 1351. Penril simultaneously argued that the evidence was not sufficient to establish that the plaintiff was entitled to punitive damages. *Id.*

¹³² *Id.* at 1352.

¹³³ *Id.*

¹³⁴ *Id.* Damages in cases of unlawful intentional discrimination in employment are defined at 42 U.S.C. § 1981a(b). Section 1981a(b)(1) provides in pertinent part:

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b)(1) (1994).

¹³⁵ 42 U.S.C. § 1981a(b)(2) (1994).

¹³⁶ *Hennessy*, 69 F.3d at 1352. The court noted that Penril's effort to apply general Illinois tort law to a federal civil rights case was particularly inappropriate for this reason. *Id.*

¹³⁷ 42 U.S.C. § 1981a(b)(2) (1994). "Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964."

¹³⁸ *Id.* § 2000e-5(g) (1994).

¹³⁹ "Back pay is excluded from compensatory damages under § 102 of the 1991 Act 'to prevent double recovery.'" *Hennessy*, 69 F.3d at 1352 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 253 (1994)).

noted that the trial court properly “instructed the jury that it was not to award [Hennessy] back pay as an element of compensatory damages”¹⁴⁰ under § 1981a. Furthermore, the Seventh Circuit agreed that the lower court’s subsequent award of back pay pursuant to Title VII was properly thought of as compensatory in nature because it was “compensation for injury at the hands of defendants.”¹⁴¹ Without suggesting that a back pay award under Title VII was required in such situation, the Seventh Circuit concluded that the jury’s consideration of punitive damages under § 1981a was appropriate despite its failure to award compensatory damages under § 1981a.¹⁴²

b. *Timm v. Progressive Steel Treating Inc.*

In *Timm v. Progressive Steel Treating, Inc.*,¹⁴³ the Court of Appeals for the Seventh Circuit expanded on its reasoning in *Hennessy*¹⁴⁴ and determined that neither a compensatory nor a nominal damage award must accompany a punitive damage award under § 1981a.¹⁴⁵ Charmaine Timm, a former employee of Progressive Steel Treating (“Progressive”), brought a Title VII sexual harassment action against Progressive.¹⁴⁶ Timm testified that her co-worker frequently grabbed and pinched her buttocks, touched her thighs, and made frequent sexual comments and propositions.¹⁴⁷ Timm further testified that she complained to her supervisor, but that nothing was done.¹⁴⁸ After six months of employment with Progressive, Timm voluntarily left her employment.¹⁴⁹ At the close of the jury trial, Timm did not request an instruction on nominal damages.¹⁵⁰ The jury concluded that

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* In a later section of the opinion, the court emphasized that the jury could have awarded punitive damages in the case. *Id.* at 1356. It concluded, however, that the case was not “so egregious that an award at 100 percent of what can legally be awarded against a company of Peril’s size is appropriate.” *Id.* As a result, the court vacated the punitive award and remanded the matter to the district court to decide the amount of punitive damages. *Id.*

¹⁴³ *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998).

¹⁴⁴ *Hennessy*, 69 F.3d at 1344.

¹⁴⁵ *Timm*, 137 F.3d at 1010.

¹⁴⁶ *Id.* at 1009.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1010.

¹⁵⁰ *Id.*

Progressive was liable for violating Timm's Title VII rights, but did not award Timm any compensatory award under § 1981a.¹⁵¹ Also, the court did not award Timm any back pay.¹⁵² The jury, however, awarded Timm punitive damages under § 1981a.¹⁵³ Progressive appealed, alleging that punitive damages cannot be awarded when a jury has determined that a plaintiff did not suffer any compensable injury.¹⁵⁴

In rejecting Progressive's argument, the court relied on its reasoning in *Hennessy*, where it concluded that punitive damages are available under § 1981a even when the jury does not assess compensatory damages.¹⁵⁵ Nonetheless, Progressive argued further that *Hennessy* was distinguishable because, unlike the present case, there the plaintiff was awarded back pay under 42 U.S.C. § 2000e-5(g), a Title VII damage provision. The Seventh Circuit rejected the notion that an award of back pay under Title VII is determinant in allowing a jury to award punitive damages under § 1981a when it has not awarded compensatory damages under § 1981a.¹⁵⁶ Rather, the court noted that the fact that the plaintiff found better-paying work—and thus did not receive back pay as a result—does not preclude other remedies,¹⁵⁷ including those available under § 1981a.¹⁵⁸

To further support its conclusion that neither a back pay nor compensatory damage award is required to accompany a punitive damage award, the court focused on a statutory analysis.¹⁵⁹ First, the court reiterated its statement in *Hennessy*, emphasizing that “‘[n]othing in the plain language of § 1981a conditions an award of punitive damages on an underlying award of compensatory damages.’”¹⁶⁰ Second, the court relied on 42 U.S.C. § 1983 jurisprudence.¹⁶¹ In doing so, the court emphasized the longstanding rule that “when a jury finds a constitutional violation under a § 1983 claim, it may award punitive damages even when it does not

¹⁵¹ *Id.*

¹⁵² *Id.* In a Title VII action, the court—and not the jury—awards back pay. *See infra* note 205.

¹⁵³ *Timm*, 137 F.3d at 1010.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (alteration in original) (quoting *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1352 (7th Cir. 1995)).

¹⁶¹ *Id.*

award compensatory damages.”¹⁶² Specifically, the court cited several cases emphasizing that punitive damages are available following a finding of a § 1983 violation and a nominal damage award even if the plaintiff has suffered no actual injury.¹⁶³ Thereafter, the court reiterated the goal and practice of uniformity with respect to enforcing the civil rights laws and, as a result, found “[n]o reason . . . for reading a compensatory-punitive link into § 1981a or Title VII but not [into] § 1983.”¹⁶⁴ Indeed, in *Timm*, the Seventh Circuit made it clear that a jury could award punitive damages under § 1981a without awarding either compensatory damages under § 1981a or *any other* “compensatory-like”¹⁶⁵ damages under Title VII.¹⁶⁶

¹⁶² *Id.* (quoting *Erwin v. Manitowoc County*, 872 F.2d 1292, 1299 (7th Cir. 1989)).

¹⁶³ See *Sahigian v. Dickey*, 827 F.2d 90, 100 (7th Cir. 1987); *McKinley v. Trattles*, 732 F.2d 1320, 1326 (7th Cir. 1984).

¹⁶⁴ *Timm*, 137 F.3d at 1010.

¹⁶⁵ “Compensatory-like” damages refers to back pay relief, which is provided for in section 706(g) of the Civil Rights Act of 1964, Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 241, 261 (1964) (current version at 42 U.S.C. § 2000e-5(g) (1994)). Nominal damages, which are not compensation for loss or injury but are recognition of a violation, are not compensatory-like. See *Carey v. Phipps*, 435 U.S. 247, 266-67 (1978).

¹⁶⁶ *Timm*, 137 F.3d at 1008-11. Less than two months after *Timm*, in *Paciorek v. Michigan Consolidated Gas Co.*, the United States District Court for the Eastern District of Michigan relied on the Seventh Circuit’s reasoning. *Paciorek v. Mich. Consol. Gas Co.*, 179 F.R.D. 216, 220-21 (E.D. Mich. 1998). The plaintiff alleged that the defendant, her former employer, discriminated against her on the basis of her sex in violation of Title VII and Michigan state laws. *Id.* at 217. The plaintiff also brought a claim for intentional disability discrimination and failure to reasonably accommodate in violation of the Americans with Disabilities Act (“ADA”), Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101 - 12213 (1994) and in scattered sections of 47 U.S.C.), and also asserted several common law claims. *Paciorek*, 179 F.R.D. at 217-18. After a trial, the jury returned a verdict finding that the defendant violated the ADA by failing to accommodate the plaintiff’s disability, but did not find any liability on the remaining claims. *Id.* at 218. As a result, the jury awarded the plaintiff \$30,000 in punitive damages, but did not award any compensatory damages. *Id.* The plaintiff never requested a nominal damages instruction, nor was one ever given. *Id.*

In post-trial motions, the defendant requested that the court vacate the punitive damage award because the plaintiff “failed to obtain either compensatory or nominal damages.” *Id.* at 220. In doing so, the defendant relied on the traditional tort principle, found in comments (b) and (c) to section 908 of the *Restatement*

Furthermore, the court did not indicate or suggest that a nominal damage award is required to accompany such award.¹⁶⁷

c. *Cush-Crawford v. Adchem Corp.*

Most recently, in *Cush-Crawford v. Adchem Corp.*,¹⁶⁸ the United States District Court for the Eastern District of New York followed the Seventh Circuit's reasoning in *Timm v. Progressive Steel Treating, Inc.*¹⁶⁹ The plaintiff alleged that while employed at Adchem's Westbury, New York, facility, "she suffered repeated unwelcome sexual advances and comments from her supervisor."¹⁷⁰ The plaintiff further alleged that she complained about the behavior, but that no action was taken.¹⁷¹ Eventually, she was able to transfer to another Adchem plant but grew dissatisfied with the new plant and asked to transfer back to her original Adchem location, although requesting an intermediate layer of supervision between her and her alleged harasser.¹⁷² A few months following her transfer back to Westbury, the

(*Second*) of Torts, that a "claimant may not recover punitive damages without first establishing liability for either compensatory or nominal damages." *Id.* Immediately, however, the court rejected the application of traditional torts theory to federal civil rights claims, emphasizing that the Seventh Circuit has held that 42 U.S.C. § 1981a, which specifically authorizes compensatory and punitive damages, defines when punitive damages may be granted. *Id.* Furthermore, the court noted that 42 U.S.C. § 1981a(a)(2) states that those who bring successful ADA "failure to accommodate claims" may recover compensatory and punitive damages as allowed in 42 U.S.C. § 1981a(b). *Id.* at 221. Thereafter, the court cited several Title VII and § 1983 cases where punitive damages have been awarded with the absence of compensatory damages. *Id.* at 220. *See generally Timm*, 137 F.3d at 1008; *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995); *Erwin v. County of Manitowoc*, 872 F.2d 1292 (7th Cir. 1989). The court then endorsed the Seventh Circuit's reasoning for finding a sharp distinction between state common law and federal civil rights legislation and reiterated that "[e]xtra-statutory requirements for recovery should not be invented." *Paciorek*, 179 F.R.D. at 221 (alteration in original) (quoting *Timm*, 137 F.3d at 1010). Indeed, the court emphasized that there is nothing within § 1981a that conditions punitive damages upon an award of compensatory or nominal damages. *Id.* As a result, the court upheld the Plaintiff's punitive damage award. *Id.* at 221-22.

¹⁶⁷ *Paciorek*, 179 F.R.D. at 221.

¹⁶⁸ *Cush-Crawford v. Adchem Corp.*, 94 F. Supp. 2d 294 (E.D.N.Y. 2000).

¹⁶⁹ *Id.* at 299.

¹⁷⁰ *Id.* at 296.

¹⁷¹ *Id.*

¹⁷² *Id.*

plaintiff “suffered an unrelated on-the-job injury, and never returned to Adchem.”¹⁷³ The plaintiff then commenced an action, alleging sexual harassment and retaliation in violation of the New York State Human Rights Law and Title VII.¹⁷⁴

The jury returned a verdict in favor of the plaintiff on her sexual harassment claim and awarded the plaintiff \$100,000 in punitive damages under § 1981a,¹⁷⁵ but did not award any compensatory damages.¹⁷⁶ Furthermore, the plaintiff did not request a nominal damages instruction and no such damages were awarded.¹⁷⁷

After noting that various views exist with respect to the issue at hand, the court, like *Hennessy*¹⁷⁸ and *Timm*,¹⁷⁹ noted that nothing in the text of § 1981a requires a compensatory award to accompany a punitive award.¹⁸⁰ Thereafter, the court followed the Seventh Circuit’s reliance on § 1983 jurisprudence to reiterate that “an award of compensatory damages is not a prerequisite to the jury awarding punitive damages”¹⁸¹ to a victim of a § 1983 violation.¹⁸² As a result, the court saw “no reason . . . for reading a compensatory-punitive link into . . . Title VII but not Section 1983.”¹⁸³ In sum, like *Timm*, the court concluded that there is no requirement that a compensatory award accompany a punitive damage award under § 1981a.¹⁸⁴ Unlike *Timm*, however, the court explicitly stated that there is no

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 296-97.

¹⁷⁵ Although the plaintiff alleged “sexual harassment claims . . . under both Title VII and the New York State Human Rights Law, the propriety of the punitive damage award must be assessed only under federal law, as punitive damages are not available under the [New York] State Human Rights Law.” *Id.* at 298-99.

¹⁷⁶ *Id.* at 298.

¹⁷⁷ *Id.* at 297. The court stated that because plaintiff made no request for a nominal damage award, the court “need not decide whether the [p]laintiff was entitled to a nominal damage award, as a matter of law.” *Id.* at 299. The court noted, however, that various cases have made it clear that a nominal damage award is permitted under Title VII, but is not mandatory. *Id.*; see, e.g., *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205 (1st Cir. 1995).

¹⁷⁸ *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995).

¹⁷⁹ *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998).

¹⁸⁰ *Cush-Crawford*, 94 F. Supp. 2d at 299.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* (omissions in original) (quoting *Timm*, 137 F.3d at 1010).

¹⁸⁴ *Id.* Three months prior to *Cush-Crawford*, the same court briefly touched upon this issue. In *Fernandez v. North Shore Orthopedic Surgery & Sports Medicine, P.C.*, the plaintiff brought two causes of action based on retaliation in

requirement that a nominal damage award accompany a punitive damage award under § 1981a.

2. *Courts Requiring a Compensatory,
"Compensatory-Like," or Nominal Damage Award*

a. *Kerr-Selgas v. American Airlines, Inc.*

In *Kerr-Selgas v. American Airlines, Inc.*,¹⁸⁵ the Court of Appeals for the First Circuit concluded that an award of punitive damages under § 1981a must be accompanied by a compensatory award under § 1981a or, at a minimum, by a nominal damage award.¹⁸⁶ In *Kerr-Selgas*, Mary Jane Kerr-Selgas brought a suit against her former employer alleging sex discrimination, sexual harassment, and retaliation under both Puerto Rico law and Title VII.¹⁸⁷ After a jury trial, the U.S. District Court for the District of Puerto Rico entered judgment against the defendants for \$2,000,000 in compensatory damages for claims arising under Puerto Rico law; \$350,000 in punitive damages for claims arising under Title VII; and \$20,000 in severance pay on the wrongful discharge claim.¹⁸⁸

violation of Title VII. *Fernandez v. N. Shore Orthopedic Surgery & Sports Med., P.C.*, 79 F. Supp. 2d 197, 200 (E.D.N.Y. 2000). The jury awarded \$100,000 in back pay, \$160,000 in front pay, and \$100,000 in punitive damages—all under § 1981a. *Id.* Subsequently, the defendant moved for a motion for new trial or remittitur, arguing that the verdict finding was against the weight of the evidence and excessive. *Id.* In evaluating the amount of the jury's punitive damage award, the court noted that "the ratio of compensatory damages to punitive damages . . . [was] extremely high . . . [because] the jury did not award [the plaintiff] compensatory damages." *Id.* at 208. Rather, the non-punitive damages awarded were back pay and front pay awards, both which are excluded from the compensatory damage definition in § 1981a(b)(2), but are included in Title VII. Thereafter, the court evaluated other factors to determine if the punitive damage award was excessive and determined that an award of \$50,000 rather than \$100,000 was appropriate. *Id.* As a result, the court allowed the jury to award punitive damages under § 1981a where it had not awarded any compensatory award under § 1981a. Nonetheless, the court did not discuss whether it considered the back pay or front pay award to be compensatory-like and, as such, to be the basis for the jury's punitive award.

¹⁸⁵ *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205 (1st Cir. 1995).

¹⁸⁶ *Id.* at 1215.

¹⁸⁷ *Id.* at 1207.

¹⁸⁸ *Id.* at 1209.

On appeal, the First Circuit evaluated the apportionment of damages.¹⁸⁹ In doing so, the court concluded that while the district court “supportably ascribed the entire compensatory damages award to the . . . [claims arising under Puerto Rico law], its ruling casts doubt upon any punitive damages award on the federal claims.”¹⁹⁰ Relying on the *Restatement (Second) of Torts*¹⁹¹ and *Cooper Distributing Co. v. Amana Refrigeration, Inc.*,¹⁹² a state law tort case, the defendant argued that generally “a claimant may not recover punitive damages without establishing liability for either compensatory or nominal damages.”¹⁹³ Because the jury did not award any compensatory damages based on Kerr-Selgas’s Title VII claims, the court then sought to determine if she was entitled to nominal damages based on her Title VII claims, despite her failure to request such relief.¹⁹⁴

In evaluating the practice of awarding nominal damages in employment discrimination actions, the court looked to decisions under § 1981. The court noted *Hicks v. Brown Group Inc.*,¹⁹⁵ where the Eighth Circuit relied on *Carey v. Phipus*,¹⁹⁶ to conclude that a § 1981 violation entitled the victim to nominal damages irrespective of actual injury.¹⁹⁷ Nonetheless, the court emphasized that nothing in *Carey* mandates a nominal damages award in a Title VII case.¹⁹⁸ As a result and unlike that which occurs after a finding of § 1981 or § 1983 liability, the court concluded that a finding of liability under Title VII does not compel an award of nominal damages absent a timely request.¹⁹⁹ The court concluded that because Kerr-Selgas’s Title VII punitive damage award was accompanied by neither a Title VII

¹⁸⁹ *Id.* at 1214.

¹⁹⁰ *Id.*

¹⁹¹ RESTATEMENT (SECOND) OF TORTS § 908 cmts. b-c (1964).

¹⁹² *Cooper Distrib. Co. v. Amana Refrigeration, Inc.*, 63 F.3d 262 (3d Cir. 1995). In *Cooper*, the jury found for Cooper on its claim for tortious interference with prospective business advantage, but did not award compensatory damages. *Id.* at 281. The jury did, however, award \$3,000,000 in punitive damages. *Id.* On appeal, the court concluded that a failure to award compensatory damages on the claim, and Cooper’s failure to request a nominal damage instruction, precluded an award of punitive damages. *Id.* at 282-83.

¹⁹³ *Kerr-Selgas*, 69 F.3d at 1214.

¹⁹⁴ *Id.*

¹⁹⁵ *Hicks v. Brown Group Inc.*, 902 F.2d 630 (8th Cir. 1990), *vacated on other grounds by* 499 U.S. 914 (1991).

¹⁹⁶ *Carey v. Phipus*, 435 U.S. 247 (1978).

¹⁹⁷ *Kerr-Selgas*, 69 F.3d at 1214-15.

¹⁹⁸ *Id.* at 1215.

¹⁹⁹ *Id.*

compensatory damage award nor a timely request for nominal damages, her punitive damage award should be vacated.²⁰⁰

In sum, unlike other courts that rejected reliance on general tort principles in assessing damage awards under the federal civil rights statutes, the First Circuit *did* rely on general tort principles to hold that an award of punitive damages must be accompanied by a compensatory or nominal damage award.

b. Provencher v. CVS Pharmacy, Division of Melville Corp.

Three years later, in *Provencher v. CVS Pharmacy, Division of Melville Corp.*,²⁰¹ the Court of Appeals for the First Circuit faced for a second time the question whether a jury could award punitive damages to a Title VII plaintiff who did not suffer any compensable injury.²⁰² Richard Provencher, an assistant manager of one of the defendant's stores, brought suit against CVS Pharmacy, alleging Title VII claims of sexual harassment and retaliation.²⁰³ The jury found that CVS retaliated against Provencher for filing a sexual harassment claim and awarded him \$8000 in punitive damages but no compensatory damages.²⁰⁴ Based on the jury's finding of liability, the U.S. District Court for the District of New Hampshire awarded Provencher back pay totaling approximately \$10,000 and front pay totaling approximately \$141,000.²⁰⁵

²⁰⁰ *Id.*

²⁰¹ *Provencher v. CVS Pharmacy, Div. of Melville Corp.*, 145 F.3d 5 (1st Cir. 1998).

²⁰² *Id.* at 11.

²⁰³ *Id.* at 7-8.

²⁰⁴ *Id.* at 10. The jury was directed to "award the appropriate amount of damages for emotional pain and suffering, mental anguish, inconvenience, loss of enjoyment, and necessary counseling, resulting from CVS' retaliation." *Id.* at 10-11 n.3. The jury, however, did not find any such damages. *Id.*

²⁰⁵ *Id.* at 11-12. Awards of back pay and front pay are issues for the court to decide and not for the jury. See 42 U.S.C. § 2000e-5(g)(1) (1994) (stating that a court may award back pay as equitable relief for a Title VII violation); *Winsor v. Hinckley Dodge, Inc.*, 79 F.3d 996, 1002 (10th Cir. 1996) (stating that equitable remedies allowable under § 2000e-5(g)(1) include front pay). Front pay may be awarded where an employer has created an environment where reinstatement is not a reasonable remedy. In awarding front pay, the court must determine "the amount required to compensate a victim for the continuing future effects of discrimination until the victim can be made whole." *Carter v. Sedgwick County, Kan.*, 929 F.2d 1501, 1505 (10th Cir. 1991).

Relying on the decision in *Kerr-Selgas*,²⁰⁶ CVS appealed the punitive damage award.²⁰⁷ In distinguishing the facts of *Kerr-Selgas*, the court emphasized that the district court had conditioned its punitive damage award on its back pay award.²⁰⁸ In contrast, the punitive damage award in *Kerr-Selgas* did not rest on "back pay or any remedy which was compensatory in function."²⁰⁹ Further, the court relied on the Seventh Circuit's analysis in *Hennessy v. Penril Datacomm Networks, Inc.*²¹⁰ to conclude that an award of punitive damages and back pay, in the absence of compensatory damages, is proper under Title VII and § 1981a.²¹¹ In doing so, the court noted the discussion in *Hennessy* regarding the omission of back pay from § 1981a, but further emphasized that back pay is a "make-whole" remedy that serves as compensation for the injury of lost wages.²¹² As a result of the back pay award, the court concluded that the jury could award punitive damages even without awarding compensatory damages under § 1981a.²¹³ Unlike the courts in *Timm*²¹⁴ and *Cush-Crawford*,²¹⁵ the First Circuit in *Provencher* stopped short of concluding that a jury could award a punitive damage award without awarding either a compensatory award under § 1981a or some other compensatory-type²¹⁶ or nominal award under Title VII.

V. RESOLVING THE CONFLICT AMONG THE COURTS

Future courts should apply the reasoning of *Timm v. Progressive Steel Treating, Inc.*²¹⁷ and *Cush-Crawford v. Adchem Corp.*²¹⁸ to conclude that neither a compensatory damage award of any kind, including back pay, nor a nominal damage award is a prerequisite for a punitive damage award under 42 U.S.C. § 1981a. First, while § 1981a clearly addresses

²⁰⁶ *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205, 1205 (1st Cir. 1995).

²⁰⁷ *Provencher*, 145 F.3d at 11.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995).

²¹¹ *Provencher*, 145 F.3d at 12.

²¹² *Id.* at 11-12 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 252-53 (1994)).

²¹³ *Id.* at 12.

²¹⁴ *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998).

²¹⁵ *Cush-Crawford v. Adchem Corp.*, 94 F. Supp. 2d 294 (E.D.N.Y. 2000).

²¹⁶ See *supra* note 165.

²¹⁷ *Timm*, 137 F.3d at 1008.

²¹⁸ *Cush-Crawford*, 94 F. Supp. 2d at 294.

compensatory and punitive damage awards, nothing in the plain language of the statute suggests otherwise.²¹⁹ Second, in enacting § 1981a, Congress intended to unify the damages provisions of the federal civil rights laws.²²⁰ As a result, an award of punitive damages under § 1981a should be subjected to the same prerequisites as punitive damage awards under 42 U.S.C. § 1981 and § 1983. Third, the absence of back pay or any other type of economic or compensatory damage award does not, at all, imply that the victim of Title VII discrimination is not entitled to punitive damages. Rather, a finding of a Title VII violation should by itself act as a basis for a jury to consider punitive damages under § 1981a. Fourth, relying on a jury's apportionment of damages to determine the relief available to a victim of discrimination could lead to impractical, inconsistent and unworkable results.

A. The First Circuit Incorrectly Relied on General Tort Principles

Cases such as *Kerr-Selgas v. American Airlines, Inc.*,²²¹ which require a compensatory or nominal award to accompany a punitive damage award under § 1981a, incorrectly rely on a non-universal tort principle that a "claimant may not recover punitive damages without establishing liability for either compensatory or nominal damages."²²² Other cases such as *Timm* and *Cush-Crawford*, which do not apply this rule, correctly emphasize that reliance on common law tort principles is incorrect and irrelevant when, as in this context, the federal statute at issue contains its own damage provision.²²³ When analyzing the damage provision of § 1981a, those courts correctly focus on the plain language of the statute.²²⁴ Unlike common law compensatory damages, which include back pay damages therein, the language of § 1981a omits back pay—the most frequent type of economic compensatory damages.²²⁵ Instead, back pay damages are provided for in

²¹⁹ 42 U.S.C. § 1981a (1994).

²²⁰ H.R. REP. NO. 102-40, pt. 2, at 24-29 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717-23.

²²¹ *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205 (1st Cir. 1995).

²²² *Id.* at 1214.

²²³ *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998); *Cush-Crawford v. Adchem Corp.*, 94 F. Supp. 2d 294, 299 (E.D.N.Y. 2000).

²²⁴ *Timm*, 137 F.3d at 1010; *Cush-Crawford*, 94 F. Supp. 2d at 299.

²²⁵ 42 U.S.C. § 1981a(b)(2) (1994).

Title VII, which did not originally allow the compensatory damages provided for by § 1981a.²²⁶

Indeed, reliance on state law tort principles serves to only further divide the courts when deciding if Title VII plaintiffs are entitled to punitive damages without a compensatory or nominal award. While the *Kerr-Selgas* court relied on New Jersey tort law and the *Restatement (Second) of Torts*, which require at least a nominal award predicate to a punitive award,²²⁷ not all states follow such a rule. Rather, several jurisdictions significantly contrast the *Kerr-Selgas* rule by concluding that a finding of harm or injury—without an award of compensatory or nominal damages—is sufficient to support a punitive damage award in tort actions.²²⁸ Furthermore, some jurisdictions such as Illinois contrast the *Kerr-Selgas* rule by requiring a compensatory damage award predicate to a punitive damage award in a tort action.²²⁹ As a result, some courts continue to apply local tort rules to conclude that a compensatory award

²²⁶ See 42 U.S.C. § 2000e-5(g) (1994); see also *supra* notes 119, 165 and accompanying text. Nothing within the plain language of § 1981a requires, nor suggests, that a nominal damage award must accompany a punitive damage award. Unlike § 1981 and § 1983, where courts have concluded that a nominal award automatically follows a finding of liability, courts have *not* concluded that such award accompanies a finding of liability under Title VII. In fact, the few courts that have addressed this issue have concluded that Title VII does not, in any way, mandate a nominal damage award upon a finding of liability. See *infra* note 240 and accompanying text.

²²⁷ The *Kerr-Selgas* court relied on *Cooper Distributing Co. v. Amana Refrigeration, Inc.*, where the court reasoned that under New Jersey tort law, a plaintiff alleging tortious interference with prospective business advantage could not recover punitive damages in the absence of compensatory damages or, at a minimum, nominal damages. *Kerr-Selgas*, 69 F.3d at 1214; *Cooper Distrib. Co. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 281-83 (3d Cir. 1995). The *Kerr-Selgas* court also relied on comments (b) and (c) to section 908 of the *Restatement (Second) of Torts*. *Kerr-Selgas*, 69 F.3d at 1214. Comment (c) states in part that “an award of nominal damages . . . is enough to support a further award of punitive damages.” RESTATEMENT (SECOND) OF TORTS § 908 cmt. c, at 464 (1964).

²²⁸ *Haskins v. Sheldon*, 558 P.2d 487, 492-93 (Alaska 1976); *Brandstetter v. City Inv. Corp.*, 243 Cal. Rptr. 431, 436 (Ct. App. 1988); *Topanga Corp. v. Gentile*, 58 Cal. Rptr. 713, 719 (Ct. App. 1967); *Ault v. Lohr*, 538 So. 2d 454, 456 (Fla. 1989); *Pringle Tax Serv., Inc. v. Knoblauch*, 282 N.W.2d 151, 154 (Iowa 1979); *Anderson v. Kammeier*, 262 N.W.2d 366, 372 (Minn. 1977); *Goodale v. Lachowski*, 775 P.2d 888, 890 (Or. Ct. App. 1989).

²²⁹ *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1351-52 (7th Cir. 1995).

must accompany a Title VII punitive award while other courts apply local tort rules to conclude that a nominal award is sufficient. Still other courts continue to apply local tort rules to conclude that a mere *finding* of injury without an award of compensatory or nominal damages permits a Title VII plaintiff to obtain punitive damages. In sum, allowing courts to rely on local tort rules when presiding over Title VII cases results in inconsistent and illogical decisions, serves to confuse § 1981a jurisprudence, and stymies unification of the various remedies available under the federal civil rights laws.

B. Further Unifying the Federal Civil Rights Laws

Allowing a punitive damage award without an accompanying compensatory or nominal award would further effectuate Congress's goal of creating greater uniformity among the federal civil rights statutes.²³⁰ In enacting 42 U.S.C. § 1981a, and the damage provisions therein, Congress intended to unify the remedies and protections among the federal civil rights statutes.²³¹ Despite the statutory limits on the total damage award, Congress extended compensatory and punitive relief to Title VII victims just as was already available to § 1981 and § 1983 victims.²³² Furthermore, Congress applied the same standard to punitive damages under § 1981a as the courts had applied to § 1981 and § 1983.²³³ Likewise, applying the same rules for awarding punitive damages under § 1981, § 1983 and § 1981a would further Congress's goal of uniformity while also ensuring consistency and reliance among the three statutes.

As emphasized in Part III, courts have concluded that under both § 1981 and § 1983, a jury can award punitive damages without awarding compensatory damages. With Congress's primary intent in mind, courts such as *Timm*²³⁴ and *Cush-Crawford*²³⁵ have relied on § 1983 cases to

²³⁰ The legislative history of the 1991 Amendments to Title VII shows that Congress sought to unify the law for employment discrimination cases. *See* H.R. REP. NO. 102-40, pt. 2, at 24 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717.

²³¹ *See* H.R. REP. NO. 102-40, pt. 2, at 24-29 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717-23.

²³² *See supra* Part III.

²³³ H.R. REP. NO. 120-40, pt. 2, at 24 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717 ("It is the Committee's intention that damages should be awarded under Title VII in the same circumstances in which such awards are now permitted under [42] U.S.C. § 1981 in intentional race discrimination cases.").

²³⁴ *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998).

²³⁵ *Cush-Crawford v. Adchem Corp.*, 94 F. Supp. 2d 294 (E.D.N.Y. 2000).

conclude that § 1981a does not require a compensatory award to accompany a punitive damage award.²³⁶ In doing so, these courts²³⁷ have expanded on the unification goal that Congress intended and which the courts have frequently emphasized. Furthermore, expanding the “no compensatory-punitive link” to include Title VII jurisprudence would allow courts and litigants to rely on all three federal civil rights statutes when addressing issues pertaining to punitive damages.

By contrast, requiring a compensatory award could prevent further reliance on other federal civil rights laws, a frequent practice for courts faced with issues pertaining to punitive damages under the federal civil rights laws.²³⁸ Similarly, requiring a nominal damage award to accompany a punitive damage award under § 1981a could create discord, rather than unity, among the federal civil rights laws. While a finding of liability under either § 1981 or § 1983 automatically provides the victim with a nominal damage award,²³⁹ the few courts that have considered the issue have concluded that a Title VII violation does not automatically amount to a nominal damage award.²⁴⁰ Rather, a plaintiff must request that the jury receive an instruction on nominal damages, thereby placing the decision whether to award such damages in the jury’s hands.²⁴¹ Indeed, it is likely that some juries may award nominal damages after finding a Title VII violation while other juries may not, thereby allowing some—but not all—Title VII victims to recover punitive damages under § 1981a. As a result, requiring a nominal damage award to accompany a punitive award under § 1981a could cause inconsistent results within Title VII jurisprudence. Furthermore, such a rule could create discord between § 1981 and § 1983, where a finding of liability amounts to a nominal damage award, and Title VII, where a finding of liability does not translate as such. Indeed, a nominal damage award requirement could act to impede Congress’s goal to unify the protections and remedies of the federal civil rights statutes.

²³⁶ *Timm*, 137 F.3d at 1008; *Cush-Crawford*, 94 F. Supp. 2d at 294.

²³⁷ See also *Paciorek v. Mich. Consol. Gas Co.*, 179 F.R.D. 216, 220-21 (E.D. Mich. 1998).

²³⁸ See, e.g., *Edwards v. Jewish Hosp. of St. Louis*, 855 F.3d 1345 (8th Cir. 1988).

²³⁹ See *supra* notes 61-88 and accompanying text.

²⁴⁰ See *Buckner v. Franco, Inc.*, No. 97-6028, 1999 WL 232704, at *4 (6th Cir. 1999) (“[T]he one circuit court that has addressed the issue of whether nominal damages are required for violations of Title VII has held that they are not.”) (citing *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 845 (11th Cir. 1991)).

²⁴¹ *Walker*, 944 F.2d at 845.

C. *Other Remedies Should Not Be Extinguished Because Compensatory, "Compensatory-Like," or Nominal Damages Are Not Awarded*

Remedies routinely available to victims of Title VII discrimination should not be extinguished merely because a jury does not award compensatory damages under § 1981a, or any other Title VII compensatory-like, or nominal damage award. In *Timm v. Progressive Steel Treating, Inc.*,²⁴² the court of appeals noted that Timm, a victim of sexual harassment, voluntarily left her employment for a better job and thus the court speculated that this may have caused the district court not to award back pay.²⁴³ In fact, the court noted that the jury may have concluded that she was not entitled to compensatory damages under § 1981a because she voluntarily left her employment.²⁴⁴ Nonetheless, the court reasoned that this should not extinguish other remedies available to a plaintiff who the jury determines to be a victim of sex discrimination.²⁴⁵

Likewise, in *Robertson v. Bryn Mawr Hospital*,²⁴⁶ the jury concluded that the defendant was liable for sexual harassment.²⁴⁷ In addressing the reasoning behind the jury's award, the court noted that the jury may have concluded that the plaintiff—a physician—"would be unlikely to suffer ill effects from exposure to a few nude photographs of the centerfold variety" and sustained no compensatory damages as a result.²⁴⁸ Nonetheless, this did not prevent the jury from awarding other available remedies to the plaintiff, including punitive damages.²⁴⁹

²⁴² *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998).

²⁴³ *Id.* at 1010.

²⁴⁴ *Id.* Title VII allows back pay awards when an employee does not leave his or her employment voluntarily. If a plaintiff voluntarily quits, he or she must establish that it was not voluntary but was a constructive discharge as a result of the discrimination. *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 155 (3d Cir. 1999). If a plaintiff establishes constructive discharge, he or she is entitled to back pay if the subsequent job pays less than the former job. Therefore, if Timm had established that the harassment resulted in a constructive discharge and, as a result, Timm was forced to accept a subsequent job in which she earned less than she earned at Progressive Steel, she would have been entitled to back pay.

²⁴⁵ *Timm*, 137 F.3d at 1010.

²⁴⁶ *Robertson v. Bryn Mawr Hosp.*, Civ. A. No. 94-2489, 1995 WL 375837 (E.D. Pa. June 20, 1995).

²⁴⁷ *Id.* at *1.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

Victims of discrimination under Title VII are required to mitigate their damages by searching for suitable employment.²⁵⁰ To require an award of compensatory, nominal or other Title VII damages to accompany a punitive award under § 1981a would potentially punish a Title VII victim who properly, or even eagerly, mitigates his or her damages. For example, assume that instead of accepting a job offer that paid a greater salary, Charmaine Timm remained under her harassers employ. Also assume that shortly thereafter the harassment escalated to the point of intolerable working conditions and, as a result, Timm was forced to leave her job and accept a different job that did not pay as well. In light of the harassment, intolerable working conditions, and the salary decrease, Timm would be entitled to back pay under Title VII.²⁵¹ Assuming, however, that despite remaining under her harassers employ, the jury concluded that she did not suffer any compensatory damages under § 1981a. Under the First Circuit's reasoning in *Provencher v. CVS Pharmacy, Division of Melville Corp.*,²⁵² because the jury did not award compensatory damages, the back pay award would be necessary to allow the jury to award Timm punitive damages under § 1981a. Therefore, in the latter example, the plaintiff would not be entitled to punitive damages.

Such reasoning, which as shown could operate to reward a plaintiff for maximizing damages as opposed to mitigating them, contradicts the

²⁵⁰ 42 U.S.C. § 2000e-5(g)(1) (1994). An employee discharged, including one who is constructively discharged, in violation of Title VII has an obligation to attempt to mitigate his or her damages by using "reasonable diligence in finding other suitable employment." *Ford Motor Co. v. Equal Employment Opportunity Comm'n*, 458 U.S. 219, 231 (1982). The defendant has the burden of demonstrating that the plaintiff has failed to attempt to mitigate. *Clarke v. Frank*, 960 F.2d 1146, 1152 (2d Cir. 1992). The defendant can do so by establishing "(1) that suitable work existed, and (2) that the employee did not make reasonable efforts to obtain it." *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 695 (2d Cir. 1998).

²⁵¹ In such a situation, because the plaintiff remained under the defendant's employment when offered a higher paying job, it is unlikely that she would be able to establish that she, at that time, was constructively discharged. Therefore, because no adverse employment action, such as discharge, had yet occurred, plaintiff was not yet required to mitigate her damages and defendant would not be able to demonstrate that she failed to mitigate when she declined the higher paying position. *See Ford*, 458 U.S. at 231; *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 155-56 (3d Cir. 1999); *Hawkins*, 163 F.3d at 695-96; *Virgo v. Riviera Beach Ass'n, Ltd.*, 30 F.3d 1350, 1363-64 (11th Cir. 1994).

²⁵² *Provencher v. CVS Pharmacy, Div. of Melville Corp.*, 145 F.3d 5 (1st Cir. 1998).

fundamental mitigation requirement of Title VII.²⁵³ Instead, by allowing juries to consider all available remedies under Title VII, courts would ensure that all discrimination victims have an equal chance at obtaining punitive damages.

D. Relying on Jury Apportionments Would Cause Inconsistent and Impractical Results

Relying on a jury apportionment as the basis for a determination whether punitive damages are available to a victim of Title VII discrimination leads to inconsistent and impractical results. For example, plaintiffs such as those in *Kerr-Selgas v. American Airlines, Inc.*²⁵⁴ and *Cush-Crawford v. Adchem Corp.*,²⁵⁵ may bring discrimination claims pursuant to both state law and Title VII.²⁵⁶ Thereafter, state law permitting, the jury may apportion all compensatory damages to the state law and none to 42 U.S.C. § 1981a.²⁵⁷ Simultaneous to not awarding any compensatory damages under § 1981a, the jury may, however, decide to award punitive damages under § 1981a.²⁵⁸ Under the view expressed by the First Circuit in *Kerr-Selgas*, the plaintiff would not be entitled to punitive damages because the jury did not award compensatory damages based on the plaintiff's Title VII claims.²⁵⁹ In contrast, if the jury decides to apportion all or part of the compensatory damages under § 1981a rather than under

²⁵³ See 42 U.S.C. § 2000e-5(g)(1) (1994); *Ford*, 458 U.S. at 231.

²⁵⁴ *Kerr-Selgas v. Am. Airlines, Inc.*, 69 F.3d 1205 (1st Cir. 1995).

²⁵⁵ *Cush-Crawford v. Adchem Corp.*, 94 F. Supp. 2d 294 (E.D.N.Y. 2000).

²⁵⁶ In *Kerr-Selgas*, the plaintiff, who filed suit in the United States District Court for the District of Puerto Rico, "alleged sex discrimination, sexual harassment, and retaliation under commonwealth and federal law, as well as pendant commonwealth claims for wrongful termination and violation of her right to privacy." *Kerr-Selgas*, 69 F.3d at 1207. In *Cush-Crawford*, the plaintiff asserted causes of action under both Title VII and the New York State Human Rights Law. *Cush-Crawford*, 94 F. Supp. 2d at 296-97.

²⁵⁷ In *Kerr-Selgas*, the court concluded that all compensatory damages that the jury awarded under special verdict "represented compensation for injuries sustained in connection with . . . commonwealth claims," rather than federal claims. *Kerr-Selgas*, 69 F.3d at 1214.

²⁵⁸ This occurred in *Kerr-Selgas*, where the district court entered judgment against the defendants for \$2,000,000 in compensatory damages under Puerto Rico law, \$350,000 in punitive damages on the federal claims, and \$20,000 in severance pay on the wrongful discharge claim. *Id.* at 1209.

²⁵⁹ *Id.* at 1215.

state law, the plaintiff would be entitled to punitive damages under § 1981a.²⁶⁰ Likewise, if state law does not allow compensatory damages and the jury is forced to apportion any and all compensatory damages under § 1981a, the plaintiff would be entitled to punitive damages.²⁶¹ These inconsistent outcomes do not result from differences in injury among plaintiffs. Rather, the different outcomes result from relying on jury apportionments under various statutory schemes to determine if and when a jury is free to consider awarding all available remedies to a victim of Title VII discrimination. The rule as expressed by *Timm* and *Cush-Crawford*, which does not require that a nominal award or any type of compensatory award accompany a punitive damage award under § 1981a, would act to ensure that a jury's allocation of damages will not, alone, preclude a Title VII plaintiff from receiving punitive damages.

There is overwhelming support indicating that jurors do not comprehend all that is expected of them.²⁶² For example, studies agree that jurors do not understand their instructions at an acceptable level,²⁶³ that they confuse the standard of proof in civil cases,²⁶⁴ and that they fail to recall the judge's instruction that they are not bound to accept expert opinions.²⁶⁵ From these studies, one may infer that a jury may not understand the instructions or may confuse its choices regarding damages allocation under state and federal statutes or, perhaps, that the jury may not

²⁶⁰ *Id.* at 1214.

²⁶¹ The New York State Human Rights Law is one such state anti-discrimination statute that does not provide for compensatory and punitive damages. *Thoreson v. Penthouse Int'l, Ltd.*, 606 N.E.2d 1369, 1370 (N.Y. 1992) (interpreting N.Y. EXEC. LAW § 297(9) (McKinney 2001)).

²⁶² See, e.g., Anna E. Saxman & Kerry B. DeWolfe, *It's Unanimous: Jurors Don't Understand Instructions! A Proposal for Eliminating Juror Misunderstanding*, VT. B.J. & L. DIG. 55, Dec. 1998, at 55; Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988).

²⁶³ See, e.g., Saxman & DeWolfe, *supra* note 262, at 55.

²⁶⁴ See, e.g., Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 99-100 (1998).

²⁶⁵ See, e.g., *id.* at 101-02. Other research shows that jurors often attempt to make the law work fairly in a particular case. In a civil case, for example, the jury may lessen a damage award to reflect the uncertainty it may feel about liability even though the plaintiff has proven liability by a preponderance of the evidence. Similarly, the jury may increase a damage award to reflect the sympathy it feels towards a plaintiff with significantly less financial security than a defendant company. *Id.*

understand the instruction that a particular state statute does not allow for punitive damages. Finally, even if a rule is adopted allowing punitive damages only if compensatory or nominal damages are awarded, these studies suggest that it is not certain that the jury will comprehend and apply such an instruction. Such research suggests that it would be foolish to allow a jury's allocation of damages to determine whether a Title VII plaintiff is entitled to punitive damages. In sum, a rule that allows punitive damages without an accompanying compensatory or nominal award will reduce the likelihood of inconsistent Title VII awards based on jury misunderstanding or confusion. Instead, once a jury concludes that the defendant has discriminated in violation of Title VII, the jury should be able to consider whether punitive damages are appropriate.

In addition to mitigating jury confusion, a rule that does not require any nominal or compensatory damage award to accompany a punitive damage award would prevent courts from finding it necessary to read jurors' minds. For example, in *Robertson v. Bryn Mawr Hospital*,²⁶⁶ the jury concluded that the defendant was liable for sexual harassment to the plaintiff but did not award the plaintiff any compensatory damages.²⁶⁷ The jury did, however, award the plaintiff \$10,000 in punitive damages.²⁶⁸ In upholding the jury award, the court concluded that the jury's "relatively modest punitive damage award *might well have been characterized as compensatory damages for the harassment which plaintiff did sustain.*"²⁶⁹ Likewise, when affirming the punitive damage award in *Timm v. Progressive Steel Treating, Inc.*,²⁷⁰ the Seventh Circuit evaluated the jury's thinking by stating that "[p]erhaps the jurors preferred to award a single sum under the punitive category rather than apportion between compensatory and punitive damages."²⁷¹

The statements above confirm that problems and confusion exist regarding juries' allocations of damages under Title VII. Additional studies suggest that judges in civil trials usually incorrectly believe that jurors understand the important facts, evidence, and the applicable law.²⁷² While many judges indicate that in a bench trial they would likely have found for

²⁶⁶ *Robertson v. Bryn Mawr Hosp.*, Civ. A. No. 94-2489, 1995 WL 375837 (E.D. Pa. June 20, 1995).

²⁶⁷ *Id.* at *1.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at *2 (emphasis added).

²⁷⁰ *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998).

²⁷¹ *Id.* at 1011 (emphasis added).

²⁷² See, e.g., Saxton, *supra* note 264, at 107.

the party whom the jury found against,²⁷³ these judges also believed that the juries had understood key evidence and the law they were instructed to apply.²⁷⁴ Such research demonstrates that judges, such as those presiding over *Robertson* and *Timm*, are in no position to evaluate or speculate on jury decisions. Allowing punitive damage awards under § 1981a without a requisite nominal or compensatory award would alleviate the need for courts to engage in the futile exercise of reading jurors' minds in order to explain Title VII damage awards and allocations. No longer will judges feel the need to guess the type or purpose of jury awards under § 1981a. Rather, judges will merely need to conclude that the jury found a violation of Title VII before it considered awarding punitive damages under § 1981a.

VI. PROTECTIONS FOR DEFENDANTS SUBJECT TO PUNITIVE DAMAGE AWARDS UNDER THE FEDERAL CIVIL RIGHTS LAWS

Allowing a jury to award punitive damages under 42 U.S.C. § 1981a without awarding a compensatory or nominal damage award under that section would not subject defendants to rampant liability for acts of employment discrimination. Unlike 42 U.S.C. § 1981 and 42 U.S.C. § 1983, which allow punitive damages without a compensatory damage award,²⁷⁵ there is a cap on compensatory and punitive damages under 42 U.S.C. § 1981a.²⁷⁶ The cap, which was seen as necessary to protect employers from financial ruin and frivolous law suits,²⁷⁷ should prevent employers from fearing a rule that allows punitive damage awards without an accompanying compensatory or nominal damage award. Specifically, such a rule would not increase the maximum liability employers may face under § 1981a. Rather, recent U.S. Supreme Court guidelines along with the statutory cap ensure that the proposed rule is reasonable and would not debilitate employers.

A. *BMW of North America, Inc. v. Gore: Minimal Protections for § 1981 and § 1983 Defendants*

Because neither § 1981 nor § 1983 provides a cap on punitive damages, courts lack an upper limit or definite guideline to help them identify

²⁷³ See, e.g., *id.* at 104-05.

²⁷⁴ See, e.g., *id.* at 107.

²⁷⁵ See *supra* Part III.

²⁷⁶ 42 U.S.C. § 1981a(b)(3) (1994).

²⁷⁷ *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. 1997).

excessive awards in these cases. In *BMW of North America, Inc. v. Gore*,²⁷⁸ however, the Supreme Court articulated guideposts to assist in determining whether a punitive damage award is so excessive that it must be vacated or reduced because it shocks the judicial conscience and violates due process.²⁷⁹ The Court articulated three guideposts: (1) the degree of reprehensibility of the tortious conduct; (2) the ratio of punitive damages to compensatory damages; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases.²⁸⁰ While the Court examined the excessiveness of punitive damages in state court, these same factors apply to a review of punitive damage awards in federal court.²⁸¹ In doing so, courts have attempted to impose some consistency among § 1981 and § 1983 punitive damage awards.

In evaluating the first *Gore* guidepost, courts have emphasized that reprehensibility of the defendant's conduct is the most important factor in assessing a punitive damage award.²⁸² Courts have routinely evaluated "whether a defendant's conduct was violent or presented a threat of violence, . . . whether a defendant acted with deceit or malice as opposed to . . . mere negligence, and . . . whether a defendant has engaged in repeated instances of misconduct."²⁸³

The second *Gore* factor requires courts to evaluate the ratio between the compensatory and punitive award.²⁸⁴ While the Supreme Court noted

²⁷⁸ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

²⁷⁹ *Id.* at 574-85.

²⁸⁰ *Id.* In *BMW of North America, Inc. v. Gore*, defendant BMW decided not to advise its dealers of pre-delivery damage to new cars in cases where the cost of repair was less than three percent of the car's suggested retail price. *Id.* at 562. The jury returned a verdict of \$4000 in compensatory damages and \$4,000,000 in punitive damages under Alabama state law. *Id.* at 565. The Alabama Supreme Court reduced the punitive damage award to \$2,000,000. *Id.* at 567. On appeal, the U.S. Supreme Court held that a \$2,000,000 punitive damage award was grossly excessive in light of the low level of reprehensibility of defendant's conduct and the 500 to 1 ratio of punitive damages to compensatory damages. *Id.* at 575-83. In addition, Justice Breyer noted that when analyzing a punitive damage award for excessiveness, it is vital to consider the goal of deterrence, which involves evaluating the defendant's size and wealth. *Id.* at 591 (Breyer, J., concurring).

²⁸¹ See *Lee v. Edwards*, 101 F.3d 805, 809 n.2 (2d Cir. 1996).

²⁸² *Id.* at 809 ("[T]he Supreme Court in *Gore* noted that reprehensibility is 'perhaps the most important' factor in assessing a punitive damage award."); see also *Mathie v. Fries*, 121 F.3d 808, 816 (2d Cir. 1997); *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 994 (W.D. Wash. 1997); *Florez v. Delbovo*, 939 F. Supp. 1341, 1347 (N.D. Ill. 1996).

²⁸³ *Lee*, 101 F.3d at 809.

²⁸⁴ *Gore*, 517 U.S. at 580.

the longstanding principle that exemplary damages must bear a reasonable relationship to compensatory damages,²⁸⁵ this factor has not been problematic for subsequent courts even when juries have awarded punitive damages without compensatory damages. Rather, courts frequently refer to the language in *Gore* stating that the reasonableness of such a relationship is no "simple mathematical" formula.²⁸⁶ For example, in *Lee v. Edwards*,²⁸⁷ where a punitive damage award followed a nominal damage award in a § 1983 case, the court stated that "any appreciable exemplary award would produce a ratio that would appear excessive by this measure."²⁸⁸ As a result, the court dismissed this factor and looked to punitive damage awards in other civil rights cases as a guide.²⁸⁹ Moreover, in *Cooper v. Casey*,²⁹⁰ where the § 1983 compensatory damages were minimal, the court emphasized that the smaller the compensatory damages, the higher the ratio of punitive to compensatory damages must be in order for punitive damages to achieve the deterrence objective.²⁹¹ In sum, the Supreme Court's instruction to evaluate the ratio between the compensatory and punitive award has not affected the general rule that allows punitive damages without compensatory damages under § 1981 and § 1983; nor has this factor impeded courts' abilities to evaluate the excessiveness of punitive damage awards under these statutes.²⁹²

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 582. The Supreme Court further stated in *Gore* that:

Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

Id.; see also *Cooper v. Casey*, 97 F.3d 914, 919 (7th Cir. 1996); *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 994-95 (W.D. Wash. 1997); *Florez v. Delbovo*, 939 F. Supp. 1341, 1348 (N.D. Ill. 1996).

²⁸⁷ *Lee*, 101 F.3d at 805.

²⁸⁸ *Id.* at 811.

²⁸⁹ *Id.* The court also noted the Supreme Court's observations in *Gore* when it stated that "violations of civil rights may very well be 'particularly egregious' acts that result in only 'a small amount of economic damages' or injuries whose monetary value is 'difficult to determine.'" *Id.* (quoting *Gore*, 517 U.S. at 582).

²⁹⁰ *Cooper*, 97 F.3d at 914.

²⁹¹ *Id.* at 919-20.

²⁹² This is so despite the Supreme Court's statement that the ratio of the punitive damage award to the actual harm inflicted on the plaintiff is perhaps the "most commonly cited indicium of an unreasonable or excessive punitive damages

The third *Gore* factor requires courts to compare the punitive damage award to civil and criminal penalties authorized or imposed in similar cases.²⁹³ While courts continually look to punitive damage awards in other § 1981 and § 1983 cases both within and outside of the controlling jurisdiction,²⁹⁴ courts also look to punitive damages awarded in Title VII cases for guidance. For example, in *Florez v. Delbovo*,²⁹⁵ the court sought to determine whether a \$750,000 punitive damage award under § 1981 was excessive.²⁹⁶ In doing so, the court noted that while no federal civil fines or criminal penalties applied to the conduct in question, “§ 1981a, the statute that is perhaps most similar . . . caps all civil damage awards at \$300,000.”²⁹⁷ Thereafter, the court indicated that such cap demonstrates Congress’s judgment as to the appropriate level of punitive damages, and then reduced the punitive damage award to \$275,000.²⁹⁸ Likewise, in *Fall v. Indiana University Board of Trustees*,²⁹⁹ the court sought to determine whether a § 1983 punitive damage award of \$800,000 was excessive, where the defendant allegedly grabbed and forcibly kissed the plaintiff while reaching inside her blouse to fondle her breasts.³⁰⁰ In looking to penalties inflicted upon defendants for comparable conduct, the court referred to several Title VII sexual harassment decisions.³⁰¹ More specifically, the court noted several Title VII decisions where defendants engaged in similar conduct, but the punitive damage awards were significantly lower.³⁰² Such decisions aided the court to determine that \$50,000 was a more appropriate punitive damage award.³⁰³

While the factors in *Gore* have provided guidance to courts seeking to evaluate punitive damage awards under § 1981 and § 1983, neither statute has a damage cap to act as a guide or limit to such damages. As a result,

award.” *Gore*, 517 U.S. at 580.

²⁹³ *Id.* at 583-85.

²⁹⁴ See *Mathie v. Fries*, 121 F.3d 808, 812-13 (2d Cir. 1997); *Lee v. Edwards*, 101 F.3d 805, 811-12 (2d Cir. 1996); *Fall v. Ind. Univ. Bd. of Trs.*, 33 F. Supp. 2d 729, 746 (N.D. Ind. 1998); *Florez v. Delbovo*, 939 F. Supp. 1341, 1349 (N.D. Ill. 1996).

²⁹⁵ *Florez*, 939 F. Supp. at 1341.

²⁹⁶ *Id.* at 1347-49.

²⁹⁷ *Id.* at 1348.

²⁹⁸ *Id.* at 1348-49.

²⁹⁹ *Fall*, 33 F. Supp. 2d at 729.

³⁰⁰ *Id.* at 733.

³⁰¹ *Id.* at 746.

³⁰² *Id.*

³⁰³ *Id.* at 748.

while both statutes allow for a punitive damage award without a compensatory damage award, there exist only minimal protections for defendants penalized with punitive damages. More specifically, while some courts look to the § 1981a caps for guidance, it remains possible that a § 1981 or § 1983 jury could conclude that the plaintiff did not suffer any compensable injury, but can award a punitive damage award over \$300,000—the maximum amount of punitive damages available under § 1981a.³⁰⁴ In fact, as discussed above, the *Cooper* court noted that such ratio may even be necessary to achieve the deterrent effect of punitive damages.³⁰⁵ Despite some guidance available to protect defendants from excessive awards, juries remain able to award punitive damages to § 1981 and § 1983 victims without awarding compensatory damages.³⁰⁶

*B. The Statutory Cap and BMW of North America, Inc. v. Gore:
Additional Protections for Title VII Defendants*

Unlike defendants facing punitive damages under § 1981 or § 1983, employers facing punitive damages under Title VII are protected by a statutory cap that limits compensatory and punitive damages according to the size of the employer.³⁰⁷ As a result, allowing a jury to award punitive

³⁰⁴ 42 U.S.C. § 1981a(b)(3)(D) (1994).

³⁰⁵ *Cooper v. Casey*, 97 F.3d 914, 919-20 (7th Cir. 1996); *see also* *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1273 (10th Cir. 2000) (applying the second *Gore* factor to conclude that where the injury is primarily personal, a greater ratio of punitive damages to compensatory damages may be appropriate); *cf. McKinley v. Trattles*, 732 F.2d 1320, 1328 (7th Cir. 1984) (concluding that the “failure of the jury to assess compensatory damages . . . suggests that the goals of punishment and deterrence will be adequately served by a reduced award”).

³⁰⁶ *See* 137 CONG. REC. S15,020 (daily ed. Oct. 22, 1991) (statement of Sen. DeConcini). Senator DeConcini noted that a Washington, D.C. law firm’s empirical study showed that unlimited damages provisions under § 1981 had not led to “unlimited awards and bonanzas for lawyers.” *Id.* For example, in actions brought under § 1981, “plaintiffs were awarded compensatory and punitive damages in only 68 of 576 reported cases between 1980 and 1989. Plaintiffs received less than \$50,000—for both compensatory and punitive damages combined—in two-thirds of these 68 cases, and received more than \$200,000 in only three instances.” 136 CONG. REC. E2478 (daily ed. July 25, 1990) (statement of Rep. Hawkins). If outrageous punitive awards have not been prevalent under § 1981, where no cap exists, there is no reason to believe that allowing Title VII plaintiffs to receive punitive damages without compensatory or nominal damages will result in outrageous punitive damages where such cap *does* exist.

³⁰⁷ 42 U.S.C. § 1981a(b)(3) (1994).

damages without an accompanying compensatory award would not subject Title VII defendants to larger *maximum* awards than they would face if a compensatory award were required to accompany a punitive award. While § 1981 and § 1983 defendants must hope that courts consider the caps, Title VII defendants can rely on such protection. This additional protection further ensures that Title VII defendants are not debilitated by a rule that allows punitive damages without an accompanying compensatory or nominal award.

Under § 1981a, the jury initially sets the punitive damage award without being told about the statutory cap.³⁰⁸ Specifically, the jury determines an amount in light of what it sees fit to punish the employer for its conduct, and to deter the defendant and others from engaging in similar activity.³⁰⁹ Thereafter, if the compensatory and punitive award, together, surpass the relevant cap, the district court reduces the award to ensure that it conforms to the cap set for an employer of the defendant's size.³¹⁰ Since the passage of § 1981a, courts have routinely reduced awards to the limit imposed by the relevant cap. In fact, courts have also reduced excessive punitive damage awards to below the relevant statutory cap. When doing so, courts demonstrate that the § 1981a(b)(3) caps serve as a supplement to the *Gore* factors rather than a mandatory award and, as such, the caps serve as additional protection to the Title VII defendant.

1. *Reduction of § 1981a Awards Below the Relevant Caps When Juries Award Compensatory and Punitive Damages Under § 1981a*

In *Gray v. Tyson Foods Inc.*,³¹¹ the jury awarded the plaintiff \$185,000 in compensatory damages and \$800,000 in punitive damages under § 1981a.³¹² In evaluating the defendant's motion for remittitur, the court first reduced the compensatory award to \$50,000.³¹³ The court then noted that \$250,000 was the maximum punitive award allowed and sought to determine if that amount was excessive.³¹⁴ After applying the *Gore* factors, the court concluded that the defendant's behavior was not "the most

³⁰⁸ *Id.* § 1981a(c)(2); *see Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. 1997).

³⁰⁹ *Luciano*, 110 F.3d at 221.

³¹⁰ 42 U.S.C. § 1981a(b)(3) (1994); *see Luciano*, 110 F.3d at 221; *Hogan v. Bangor & Aroostook R.R. Co.*, 61 F.3d 1034, 1037 (1st Cir. 1995).

³¹¹ *Gray v. Tyson Foods, Inc.*, 46 F. Supp. 2d 948 (W.D. Mo. 1999).

³¹² *Id.* at 960.

³¹³ *Id.* at 957.

³¹⁴ *Id.* at 958-59.

egregious behavior imaginable” and therefore, the maximum punishment was not reasonable.³¹⁵ Rather, the court found that the evidence supported a punitive damage award of \$100,000.³¹⁶ Similarly, in *Lawyer v. 84 Lumber Co.*,³¹⁷ the jury awarded the plaintiff \$75,000 in compensatory damages and \$250,000 in punitive damages.³¹⁸ The defendant challenged the jury award as excessive and beyond the statutory cap. When addressing the *Gore* factors, the court emphasized that the case was not “the most reprehensible case that would justify punitive damages near the \$300,000 statutory maximum.”³¹⁹ Thereafter, the court reduced the punitive award to \$150,000, an amount well below the statutory maximum.³²⁰

2. Reduction of § 1981a Awards Below the Relevant Caps When Juries Award Punitive Damages without Compensatory Damages

*Hennessy v. Penril Datacomm Networks, Inc.*³²¹ is the most poignant case to demonstrate that adequate protections exist to ensure that allowing a jury to award punitive damages under § 1981a without awarding compensatory damages would not subject defendants to limitless liability. As discussed in Part IV, in *Hennessy*, the jury did not award the plaintiff compensatory damages based on her Title VII claim, but awarded her \$350,000 in punitive damages under § 1981a.³²² Thereafter, the trial judge reduced the punitive damage award to \$100,000.³²³ On appeal, the Seventh Circuit concluded that the jury was permitted to award punitive damages without an accompanying compensatory award under § 1981a,³²⁴ and then addressed the amount of punitive damages awarded.³²⁵ In doing so, the

³¹⁵ *Id.* at 959.

³¹⁶ *Id.*

³¹⁷ *Lawyer v. 84 Lumber Co.*, 991 F. Supp. 973 (N.D. Ill. 1997).

³¹⁸ *Id.* at 975.

³¹⁹ *Id.* at 977. The court relied on the Seventh Circuit’s reasoning that the statutory cap should be taken into consideration as the amount to be awarded in the most reprehensible case. *See Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1355 (7th Cir. 1995).

³²⁰ *Lawyer*, 991 F. Supp. at 977.

³²¹ *Hennessy*, 69 F.3d at 1344.

³²² *Id.* at 1349; *see supra* note 129 and accompanying text.

³²³ *Hennessy*, 69 F.3d at 1349. Pursuant to § 1981a(b)(3), the court reduced the punitive award to the statutory cap applicable to an employer of the defendant’s size. *Id.* at 1354.

³²⁴ *Id.* at 1356.

³²⁵ *Id.* at 1354-56.

court noted that the trial judge followed the statutory damage scheme of § 1981a and reduced the jury award to the cap applicable to the size of the defendant employer.³²⁶ Subsequently, however, the court reasoned that the maximum permissible award should be reserved for egregious cases. While the jury was able to award punitive damages, the court reviewed other sex discrimination cases and concluded that the facts of *Hennessy* were not so egregious as to allow the entire award to consist of the maximum punitive amount permitted under law.³²⁷ As a result, the court remanded the case to the trial court to determine a more appropriate punitive damage award.³²⁸

The cases above demonstrate that the *Gore* guideposts and the statutory cap operate together to protect Title VII defendants from facing limitless punitive liability. Whereas § 1981 and § 1983 defendants may be subject to large punitive damage awards without accompanying compensatory awards and are protected by the *Gore* guideposts only, employers subject to similar liability under Title VII enjoy maximum protections. Indeed, *Hennessy* demonstrates that courts will scrutinize a punitive damage award that did not accompany a compensatory damage award. Moreover, *Hennessy* as well as *Gray v. Tyson Foods Inc.*³²⁹ and *Lawyer v. 84 Lumber Co.*³³⁰ show that courts are willing to protect employers by reducing a punitive damage award to below the relevant statutory cap when the employer's actions are not egregious enough to warrant the most excessive monetary punishment under § 1981a.³³¹

³²⁶ *Id.* at 1354.

³²⁷ *Id.* at 1355-56. The court noted that:

When Congress permitted, for the first time, awards of compensatory and punitive damage awards in Title VII cases, it was concerned with keeping those damages under reasonable control. It did not want Title VII awards, especially of punitive damages, to be excessive as they can be in other areas of the law.

Id. at 1355. In evaluating other sex discrimination cases, the court pointed to *Nichols v. Frank* as an example of a "more egregious" sex discrimination case. *Id.* at 1356 (citing *Nichols v. Frank*, 42 F.3d 503 (9th Cir. 1994)).

³²⁸ *Id.* at 1356.

³²⁹ *Gray v. Tyson Foods Inc.*, 46 F. Supp. 2d 948 (W.D. Mo. 1999).

³³⁰ *Lawyer v. 84 Lumber Co.*, 991 F. Supp. 973 (N.D. Ill. 1997).

³³¹ Several circuit courts have concluded that only when an award would "shock the judicial conscious . . . and constitute a denial of justice" by resulting in financial ruin, or near financial ruin, of the defendant, would the court reduce the award below the statutory cap. *Deters v. Equifax Credit Info. Servs.*, 202 F.3d 1262, 1273 (10th Cir. 2000); see *Baty v. Willamette Indus.*, 172 F.3d 1232, 1245 (10th Cir. 1999); *Luciano v. Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. 1997); *Lee v. Edwards*, 101 F.3d 805, 808-09 (2d Cir. 1996). These courts are more reluctant to reduce a

VII. CONCLUSION

The history of punitive damages demonstrates that they are intended to punish and deter wrongdoing. In 1991, Congress extended the availability of punitive damages to victims of employment discrimination under Title VII by passing 42 U.S.C. § 1981a. In doing so, Congress further unified the remedies and protections of the federal civil rights statutes while including caps to protect employers from financial ruin and frivolous litigation. Nonetheless, while victims of discrimination under 42 U.S.C. § 1981 and 42 U.S.C. § 1983 are entitled to punitive damages without suffering a compensable injury, some courts have concluded that a jury is not permitted to award punitive damages under § 1981a without awarding compensatory or nominal damages under that statute. Several reasons aside from Congress's effort to further unify the federal civil rights statutes suggest that courts should adopt and expand on the rule applied to § 1981 and § 1983 damage jurisprudence.

Nothing in the plain language of § 1981a requires a compensatory or nominal award to accompany a punitive award; nor does anything within the statute indicate that one subject to an employer's malicious behavior is not entitled to all available remedies. Indeed, allowing juries to award punitive damages to all victims of Title VII discrimination would alleviate inconsistent and impractical awards along with the need for courts to read jurors' minds. In contrast, encouraging courts to rely on state tort laws to determine whether a compensatory or nominal damage award must predicate a punitive damage award would worsen the already inconsistent § 1981a damage jurisprudence. Finally, the relevant caps under § 1981a, along with the three factors articulated in *BMW of North America, Inc. v. Gore*, provide more than adequate protection for employers facing punitive damages under § 1981a. In sum, by allowing juries to award punitive damages under § 1981a without awarding a compensatory or nominal award, courts can go one step further in ensuring that all discrimination victims are entitled to the same remedies and that all discriminatory actors are punished and deterred from illegal behavior.

§ 1981a award below the cap. Nonetheless, the cap still operates as an additional protection for defendants subject to a punitive damage award without an accompanying compensatory award—a protection that § 1981 and § 1983 defendants do not enjoy.

